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CONVEYANCER'S NOTEBOOK

REPORT ON H.M. LAND REGISTRY FOR 1957–1958

We suppose that complaints against the system of registration of title will always continue, but, although the area of compulsory registration increases year by year, the number of voluntary registrations also shows a steady increase. Unhappily, there is still appreciable delay in completing registrations and, at the time of writing, the delay appears to be even worse. This delay will have to be reduced if compulsory registration is to be extended rapidly. It is, however, fair to point out that the causes of delay are not wholly on the Registry's side. We were explaining to a delightful old practitioner recently how certain fees were calculated, but he disarmingly informed us that he was not very familiar with the system and did not pay any fees until the Registry sent him a chit. Another practitioner, boiling with rage over delay in sending back his search certificate of part of a title, thought it unreasonable to demand a plan of the part, which he had not sent.

The report (*a*) mentions the difficulties in incorporating copies of documents in the land certificates, but it would be reasonable to insist that copies should always be on a standard size paper (say, foolscap) with a binding margin. Some copies supplied and accepted are poor carbons.

Although it is not possible to tell from the report a great deal about the trends in property dealing, the Chief Land Registrar does note that as in previous years a number of freehold and leasehold flats have been registered and there appears to be no falling off in the number of large houses being converted into flats. He adds that the practice of disposing of houses on building estates

(*a*) H.M. Stationery Office, price 2s.

by leasing them instead of selling them outright appears to be slowly gaining ground. Whether this is because the ground rents form a cheap investment or on the ground of good estate management does not appear, but if the former, rent charges would suit the purpose without repeating in a hundred years the trouble we have had through long leases falling in.

There has been a sharp increase in the cost per transaction of 3s. 6d. to 28s. 5d. Nevertheless, this compares very favourably with the pre-war figure of 17s. 3d. and there does not seem to be any threat of increased fees.

We hope that the gentleman who at Christmas tide inserted the entry "the wines and minerals are excluded" reaped his just reward.

Land Registry Notice—Hawkenbury Office

The Chief Land Registrar has issued the following notice:—

"1. Further to relieve congestion in H.M. Land Registry, Lincoln's Inn Fields, the registers, filed plans and index maps relating to the County of *Kent* and the County Borough of the City of *Canterbury* are being removed to Government Buildings, Forest Road, Hawkenbury, Tunbridge Wells, Kent, on November 3 next, where as from that date the registration of title work arising from those areas will be done.

"2. The Hawkenbury sub-office is already dealing with the work from the County Boroughs of *Hastings*, *Eastbourne* and *Oxford* and the Counties of *Sussex*, *Hampshire*, *Berkshire*, *Dorset*, *Wiltshire*, *Somerset*, *Devon* and *Cornwall* and the City and County of *Bristol*. It would be a great convenience if applications for registration, searches, etc., affecting titles in these areas and in those areas mentioned in paragraph 1 above could be sent there direct.

"3. Personal searches of the registers and index maps may be made at Hawkenbury but where it is desired to inspect these records in London they will be made available at Lincoln's Inn Fields at short notice.

"4. The full address of the Hawkenbury sub-office is:—

H.M. Land Registry,
Government Buildings,
Forest Road,
Hawkenbury,
Tunbridge Wells,
Kent.

Telephone No.: Tunbridge Wells 2780/91.

"*October* 1, 1958."

Schedule A Tax—Assessment on Leases

It will be remembered that a good deal of trouble over Schedule A assessments was caused where flats were sold by way of the grant of long leases at premiums and low rents. In *Gatehouse* v. *Vise* [1957] Ch. 367 the Court of Appeal held that the landlord was assessable under section 109 of the Income Tax Act, 1952. Section 18 of the Finance Act, 1957, altered the law in the traditional way by leaving the old sections (109 and 113) standing and adding a rider. The section provides that, where a distinct part of a building is separately occupied by a tenant of the landlord of the entire building, that part *may* be treated as a distinct building and *shall* be so treated if the landlord so requires and the tenant holds under a letting for a year or more rent free or at a rent less than the Schedule A assessment.

If the rent is more than the Schedule A assessment the initiative is with the Revenue, not the landlord. Many blocks of offices have gone up since the war which have been let off in parts under long leases at rack rents. Under the old procedure, the owners were assessed and consequently obtained the repairs allowance or made a maintenance claim, which was just, as they did the structural repairs. In such cases now some inspectors are invoking section 18 of the 1957 Act. One inspector wrote that the section changed the old Schedule A practice "in relation to buildings let partly upon long leases" and that "in the case of buildings of which a part is let on a long lease these shall be separate assessments (a) on the long leased parts and (b) on the remainder." These statements are clearly unsound: the practice may have changed, but the section certainly did not change it; indeed, the primary rule that the landlord shall be assessed (1952 Act, s. 109) is still there, section 18 merely being a qualification. Further, the latter section draws no distinction between long and short leases.

If the practice above referred to can be, and is, insisted upon, injustice to the owners will result. The lessees will get the benefit of the repairs allowance though they do not carry out the repairs. It may be that the owners will be allowed their actual cost of repairs as a concession, but this does not compensate them particularly in the earlier years just after the construction of the buildings.

It has been suggested that the owners could overcome the difficulty by applying to be assessed under section 110 of the Income Tax Act, 1952, but this does not seem to be of much assistance. If the Revenue decide to assess the lessees under section 18 of the 1957 Act it seems improbable that they will think fit to assess the owner under section 110. It is rather reminiscent of a Divorce

judge's finding that A committed adultery with B but not vice versa, an intrinsically interesting proposition but somewhat impractical, a principle hardly likely to be extended to the realms of income tax. Further, the repairs allowance under section 100 of the 1952 Act is due to an owner who is the occupier or *chargeable* as landlord. An owner charged under section 110 is not an owner chargeable as landlord: he is charged at his own instance in lieu of the occupier.

The real question is whether the Revenue's " may " gives them complete discretion under section 18. Although it is true that the section, read by itself, contains no limiting context, it must be remembered that it is an excrescence on section 109 of the 1952 Act, which, as mentioned above, lays down the primary rule of assessment on the landlord. It is no doubt just to assess the lessee when he carries out the repairs, but in other cases the owner has a strong case for assessment. At any rate, draughtsmen of long leases of parts of buildings at rack rent have been warned.

THE "NEW" POWER OF ADVANCEMENT

By D. W. M. Waters, M.A., B.C.L., Barrister-at-Law

To many generations of conveyancers the trustees' power of advancement (*a*) has been a familiar feature of settlements *inter vivos* and by will. The aim of such a power has been equally familiar. The settlor has settled property upon a person or class, dependent for vesting upon the cessation of a prior interest, or upon the occurrence of an event, for example, the beneficiary attaining the age of twenty-one or the class being determined at the death of A. In the alternative, though the interest may be vested, the beneficiary may be a minor. Prior to the vesting, or during the minority, however, the settlor intends that the needs of the beneficiary shall be catered for by the trustees' discretionary application of income or capital (or both) in or towards the satisfaction of those needs (*b*). The value of such provisions was recognised in the Conveyancing Act, 1881, and the Trustee Act, 1925, so that today trustees will usually employ their statutory powers.

The general purpose for which the trustees may make such payments has been traditionally clear, namely, the satisfaction of the particular needs of the beneficiary. The wording of the instruments and statutes conferring such powers of payment may differ, but in each case the trustees are required to decide whether they have the power to make payment to satisfy the particular need, and, usually, to consider also whether the beneficiary and his particular circumstances justify the payment. The first decision is a question of law; the second consideration is a matter of the trustees' discretion on the facts. However, the courts have rarely stressed this distinction. They have tended to blend the two problems into a single question—what was the purpose of the advance? The question as to what factors the trustees ought to weigh in considering payment in the particular case has been swallowed up in the broader issue—what purposes are included

(*a*) The power of advancement and the power of maintenance are normally treated separately. For the purposes of this article, and for convenience of expression, the power of maintenance is treated as part of the overall question dealt with under a discussion of the power of advancement.

(*b*) The wisdom of such a power is so obvious that in its inherent jurisdiction over trusts, particularly in the case of trusts for accumulation, the court has sometimes assumed an intention to provide for maintenance in the interim period. Where such provision is absent, the court will therefore make an order for maintenance: see *Chapman* v. *Chapman* [1954] A.C. 429, at p. 455.

within the power?—and "purposes" almost invariably has assumed the meaning of "needs."

"Advancement," "preferment," and "maintenance" do indeed indicate particularised needs and suggest their own individual limits, but, since need is so much a matter of circumstances and emphasis in the instant case, the courts have rarely attempted definition of those terms. The limits of a power are yet more controversial when as is customary two or more of those words are coupled, though again the courts have asked—what further needs may be satisfied? It was natural then that this attitude of interpretation should immediately suggest itself when the courts were faced with the additional phrase "or otherwise for the benefit of." Did "benefit" mean that any financial need, which the trustees diagnosed, might be satisfied? Or, though the word was of "very large import" (*c*), as several judges noted, was there still some restriction?

Until recently it was never quite clear what the word meant or added. Two judges, Jessel M.R. (*d*) and Farwell J. (*e*), were of the opinion that the word ought to read disjunctively, Jessel M.R. explicitly rejecting the *ejusdem generis* rule, but no court considered (or probably would have been willing to consider, if asked) that "benefit" might arise by the simple process of payment of a lump sum by the trustees to the beneficiary. As a result "benefit" was always, though in more vague fashion, connected with need, and it followed, as with "advancement," "preferment," and "maintenance," so with "benefit," that the nature of the trustees' discretionary role was never adequately analysed.

In 1951, however, the Court of Appeal held that "benefit" could arise by the mere allocation of shares of income by the trustees to the beneficiaries, and that decision was to herald a new and somewhat unexpected future for the traditional power of advancement (*f*). A number of recent decisions has already shown that an extensive use can be made of this interpretation for the purpose of lightening otherwise heavy estate duties (*g*). Nevertheless, trustees intending to embark upon this course should take note of the caveat entered by each judge who in recent years has sanctioned such payments to the beneficiary. *Re Powles* (*h*) concerned an express power to advance for "maintenance or benefit." Asked whether the trustees

(*c*) *Re Stranger* (1891) 60 L.J.Ch. 326, at p. 327, *per* Chitty J.
(*d*) *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166, at p. 170.
(*e*) *Re Halsted's Will Trusts* [1937] 2 All E.R. 570, at p. 571.
(*f*) *Re Vestey's Settlement* [1951] Ch. 209.
(*g*) It seems probable that the power of advancement will be even more relied upon for this purpose having regard to the Finance Act, 1958, s. 23. See also *Fry* v. *I. R. C.* [1958] 3 W.L.R. 381.
(*h*) [1954] 1 W.L.R. 336.

might transfer the whole of the capital without regard to the use, or whether the application of the capital was limited to the life tenant's maintenance or to a specific purpose which the trustees considered to be for his benefit, Harman J. admitted he could give but " scanty guidance " (*i*). He was prepared to agree that, if it would be to the " general benefit " (*k*) of the life tenant to have this sum, then, the trustees so considering, the advance might be made, but, though the trustees had an uncontrolled discretion, he yet had this to say: " the trustees cannot in the circumstances hand over the money without making any inquiry as to [the life tenant's] objects or wishes for its use " (*l*). In the most recent case on the subject, *Re Moxon's Will Trusts* (*m*), Danckwerts J. was of the opinion that, though " benefit " included a payment of capital money direct to the beneficiary, " that does not absolve the trustees from making up their minds whether the payment in the particular manner which they contemplate is for the benefit of the beneficiary " (*n*).

The difficulty with the new " benefit " appears to arise from the fact that, unlike " maintenance " and " advancement," " benefit " clearly spans both the purpose for which payment is made and the exercise of trusteeship discretion. Equally, on the question of purpose, " benefit " in the new sense may well accrue where there is no need, and the consequent disassociation of purpose and need has thrown into relief for the first time the problem of the nature of the trustees' discretion.

Since the passing of the Variation of Trusts Act, 1958, may possibly reduce the importance of some of the express statutory powers of advancement, this seems an opportune moment to consider (a) the meaning of the word " benefit " in a power of advancement, and (b) the nature and importance of the trustees' discretion.

Where " Benefit " Considerations Arise

Apart from express powers to make payments to beneficiaries for specific purposes, such as " advancement," " advancement in business," " preferment," " advancement and benefit," and " maintenance and benefit," the trustees in the absence of a contrary intention may exercise various statutory powers.

Section 43 of the Conveyancing Act, 1881, enables trustees to make payments out of the income of any property for the " maintenance, education, or benefit " of an infant beneficiary, whether

(*i*) *Ibid.*, at p. 339.
(*k*) *Ibid.*
(*l*) *Ibid.*, at p. 338.
(*m*) [1958] 1 W.L.R. 165 (" advancement and benefit ").
(*n*) *Ibid.*, at p. 168.

his interest in the property be for life or greater, and whether it be an absolute interest or contingent on his attaining the age of twenty-one years or on the occurrence of any event before his attaining that age. This section still applies to instruments coming into effect before 1926, while section 31 of the Trustee Act, 1925, covers all instruments coming into effect after 1925 (*o*), and, unlike the provision in the Conveyancing Act, applies to adult as well as to infant beneficiaries. It will be recalled that section 31 is only applicable to income, and that, unless there is a contrary intention, income must be paid to an adult beneficiary with a contingent interest.

Two new statutory powers were introduced by the Trustee Act, 1925. Section 32 applies to capital, and permits payment for "advancement or benefit"; section 33 applies where any income is held on protective trusts, and on the coming into effect of the discretionary trusts permits payment for "maintenance or support or otherwise for the benefit." Finally, under section 53 the same Act gave jurisdiction to the court to appoint a person to deal in specified fashion with any property of an infant, who was beneficially entitled, "with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant."

The word "benefit" is also to be found in a similar context in the Administration of Estates Act, 1925, s. 47 (1) (*p*). However, this use is a more particular one.

The Notion of Benefit

In discussing the scope of the customary power enabling the trustees to make payments to infant and contingently interested beneficiaries for purposes other than maintenance, one invariably refers to the "power of advancement." This may be a short-hand reference (after all, advancement is usually the first word in a list of purposes), but it is more likely that advancement has always suggested to the profession something recognisable, while the power of benefiting is vague and presumably intended to relieve in the event of a possibly restrictive interpretation of other and more specific purposes, for example, "advancement," and "maintenance." Certainly leading works on the subject give this latter impression. Lewin on *Trusts* (*q*) cites a list of cases, and describes them as examples of "advancement." On the other hand Halsbury's

(*o*) *Cf. Re Dickinson's Settlement* [1939] Ch. 27.

(*p*) S. 47 (1) (iii): "Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate for the benefit of such child . . . shall be brought into account. . . ."

(*q*) (15th ed., 1950) at p. 318, note (*o*).

Statutes (*r*) quotes those same cases as authority on the word "benefit." Again Lewin (*s*) carries the comment that "the words 'advancement *or benefit*' in an express power confer a wide discretion on the trustees," while Halsbury's *Statutes* (*t*), having reproduced the earlier list of cases (which in its entirety would appear to support neither argument), goes on to note that Jessel M.R. did not consider that "benefit" had to read as *ejusdem generis* with "preferment or advancement." It is to be observed that the scope of the power of advancement (or of maintenance) is discussed in both works in connection with the relevant sections of the Trustee Act, 1925. Both works raise the question in reviewing section 32 of that Act. Lewin does not comment upon "benefit" in sections 31 and 53; Halsbury's *Statutes* (*u*) refers one back to the discussion under sections 31 and 32. Underhill's *Law of Trusts* (*a*) offers less assistance.

These various approaches seem to confirm that *Re Vestey's Settlement* (*b*) did indeed introduce a completely novel interpretation of the traditional power of advancement. However, the extent of novelty has been assessed with considerable caution. Halsbury's *Laws* (*c*) puts it this way: "At all events where the word 'benefit' is not present in the power of advancement, then advancement must not be merely to put money into the infant's pocket, . . . but must be for a definite purpose to the advantage of the infant." In paragraph 387 of volume 21 of Halsbury's *Laws*, which is concerned with section 32 of the Trustee Act, 1925, *Re Vestey's Settlement* and the subsequent *Re Ropner's Settlement Trusts* (*d*) appear to be considered as an authority for payment of a lump sum constituting "benefit" only if there is something more, for example, a proposal to accumulate or to resettle for a child's ultimate advantage. However, it is submitted that *Re Vestey's Settlement* may well be broader than this, and that such a breadth is reflected, though hesitatingly, in *Re Moxon's Will Trusts*.

Having regard to the differing views, it is proposed to analyse the courts' construction of the various clauses which conveyancers and Parliament have used to create a power of "advancement" (or of "maintenance").

(a) "Advancement"

A considerable number of express powers created during and after the Victorian era has contained no reference to "benefit."

(*r*) (2nd ed.) Vol. 26 (1951), p. 100.
(*s*) *Op. cit.*, at p. 318.
(*t*) *Op. cit.*, at p. 96.
(*u*) *Ibid.*, at p. 135.
(*a*) (10th ed., 1950) p. 417.
(*b*) [1951] Ch. 209.
(*c*) (3rd. ed.) Vol. 21 (1957), p. 179, para. 386.
(*d*) [1956] 1 W.L.R. 902.

Normally " advancement " is coupled with " preferment " (*e*), but additional or other words may be employed. In *Luard* v. *Pease* (*f*) the instrument spoke of " preferment, advancement, or establishment," while in *Simpson* v. *Brown* (*g*) the phrase adopted was " education, maintenance, or advancement." This latter clause is rather interesting. It seems seldom to have come before the courts, probably because it is so comprehensive, but the distinction between " maintenance " and " advancement," though never clarified, has long been considered by the courts to be fundamental. In general the courts appear to have been confronted either with " advancement clauses " or with " maintenance clauses." The problem is to determine the respective limits of those powers, and incidentally, the degree of overlap.

All these cases, that is, those speaking of pure " advancement " or " advancement " coupled with other words (excepting " maintenance " and " benefit "), have been uniformly interpreted; controversy has most frequently arisen upon the limits of " advancement " when appearing by itself (*h*). But it has not even needed the word " advancement " to make courts think along similar lines. The width of " advancement " as a concept as opposed to a word in a power can be seen from a number of cases which are concerned with powers specifying the exact purpose or purposes for which payments are to be made. The courts invariably talk of the beneficiary's advancement, and use that term in the pure sense in which it was discussed in *Taylor* v. *Taylor* (*i*). A good example is *Talbot* v. *Marshfield* (*k*) where the clause ran " embark in or otherwise carry on any trade or business " and " set up in business." Page Wood L.J. treated this clause as if it had been " advanced in business," while Selwyn L.J., though clearly agreeing with Page Wood L.J., went on to say that the payment of the beneficiary's husband's debts was " not within the limit or within the spirit " (*l*) of the clause. But, whatever may be the limits of the spirit, in this and other cases letter and spirit confined within the theme of " advancement " have a seemingly unbroken record of coincidence (*m*).

(*e*) See, *e.g.*, *Phillips* v. *Phillips* (1853) Kay 40, *Clarke* v. *Hogg* (1871) 19 W.R. 617 and *Re Livesey's Settlement Trusts* [1953] 2 All E.R. 723.

(*f*) (1850) 22 Ch.D. 1069.

(*g*) (1864) 11 L.T. 593.

(*h*) " Advancement " may be artificially narrowed by the use of a phrase such as " advancement of any business ": see *Re Williams' Will Trusts* [1953] Ch. 138.

(*i*) (1875) L.R. 20 Eq. 155.

(*k*) (1868) 3 Ch.App. 622.

(*l*) *Ibid.*, at p. 631.

(*m*) It was held in *Re Mead* (1918) 119 L.T. 724, that " establishing him in business " was not restricted to starting the beneficiary in business, but included " strengthening or confirming him in an existing business." The closely circumscribed nature of the clause was again discussed in *Re Williams' Will Trusts* [1953] Ch. 138.

The predominating influence of "advancement" has also gained force from the fact that alone among all possible terminology "advancement" has most nearly approached to a definition in the hands of the courts. In *Molyneux* v. *Fletcher* (*n*) Kennedy J. remarked that "advancement" on its own has "a narrow and restricted meaning," and that it applies to an early period in life. Indeed, without a contrary statement in the instrument such a restriction is presumed (*o*). But it is generally agreed that the judgment of Jessel M.R. in *Taylor* v. *Taylor* (*p*) is the "nearest approach to a definition of what is an advancement that our case law has achieved" (*q*). *Taylor* v. *Taylor* arose on the meaning of the phrase "advancement by portion" in section 5 of the Statute of Distribution, 1670. This section, now replaced by section 47 (1) of the Administration of Estates Act, 1925, required that payments of such a character by an intestate made during his life were to be brought into hotchpot by recipients who were subsequent claimants on the intestate's estate. The questions in such a case were two in number: (1) was the payment in the nature of an advancement, and, if so, (2) was there contrary evidence to rebut the presumption that this sum was an anticipation of an ultimate share under the intestacy (*r*)? In *Taylor* v. *Taylor* payments to the infant beneficiary for a number of purposes were at issue. Dismissing some of the purposes, and accepting others, Jessel M.R. said (*s*):

> "I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment of this kind."

He went on to say that a marriage settlement, instalment in a profession or business, and the purchase of a commission were the type of thing he had in mind. Equally, in the absence of contrary intention the gift of a large sum by a father to his child was presumed to be intended to start the child in life or make a permanent provision for him. But can debt payment ever possess the character of a permanent provision? This question has never been unequivocally answered. In *Taylor* v. *Taylor* Jessel M.R. refused to accept such payment as an advancement, but it is not

(*n*) [1898] 1 Q.B. 648, at p. 653 ("advancement in life").
(*o*) See, for express extension beyond infancy, *Re Kershaw's Trusts* (1868) L.R. 6 Eq. 322, *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166, and *Re Williams' Will Trusts*, *supra*.
(*p*) (1875) L.R. 20 Eq. 155.
(*q*) *Re Hayward* [1957] Ch. 528, at p. 537, *per* Jenkins L.J.
(*r*) The different uses of the word "advancement" are discussed by Jenkins L.J., *ibid.*, at p. 540.
(*s*) (1875) L.R. 20 Eq. 155, at p. 157.

clear whether he regarded this as a decision on the facts, or on a point of law. Certainly in *Re Blockley* (*t*) Pearson J. preferred to say that a payment of debts might or might not be an advancement, presumably according to the size of the payment (which might not constitute mere temporary relief) and the degree of long-term advantage to be gained from their payment (*u*). However, in *Re Scott* (*a*), though without clarifying the query arising from Jessel M.R.'s judgment, the Court of Appeal strongly supported Jessel M.R. against Pearson J. (and Page Wood V.-C. in *Boyd* v. *Boyd* (*b*)), so that it seems that for the payment of debts to come within "advancement" *per se* those debts must at least be very considerable. But, even if this is a question of fact (and the writer is more persuaded otherwise), in the light of *Taylor* v. *Taylor* and *Re Scott* it seems highly unlikely that "advancement" *per se* will ever include debt payments. Apart from the two criticised decisions, there is no case to the contrary (*c*).

This issue is still a live one, for under the Administration of Estates Act, s. 47 (1) (iii), the words "paid to . . . or settled by . . . for the benefit of" have been held to be governed and limited by the words "by way of advancement or on the marriage of." So that, with the statutory relinquishment of the words "by portion," and excepting the occasion of marriage, everything now turns upon "advancement" (*d*).

(b) "Advancement or benefit"

In many cases the express power is not restricted to "advancement," "preferment or advancement" or "placing out or advancement," but adds "or benefit" or "otherwise for the benefit of." What exactly does this add? In *Lowther* v. *Bentinck* (*e*), as has been said, Jessel M.R. thought that the word "benefit" was not to be read *ejusdem generis* with "advancement," but, since until 1951 need remained the dominant theme behind purpose, all Jessel M.R. appeared to have in mind was that

(*t*) (1885) 29 Ch.D. 250.

(*u*) *e.g.*, retaining a position in the Army: *Boyd* v. *Boyd* (1867) L.R. 4 Eq. 305.

(*a*) [1903] 1 Ch. 1. Stirling L.J. referred to sums there given as "temporary assistance" (at p. 16), though in fact the payments overall were considerable.

(*b*) *Supra.*

(*c*) In *Luard* v. *Pease* (1850) 22 Ch.D. 1069, Kindersley V.-C. was anxious to agree to such payments under such an express clause "as it would be to the benefit of the parties" (at p. 1071), but found himself prevented by the no longer youthful condition of the claimant. No other ground was given. The critical issue would arise if under a power of advancement property was settled upon the beneficiary with the specific purpose of paying his debts as they arose.

(*d*) See *Re Hayward* [1957] Ch. 528, at pp. 535 and 541, *per* Jenkins L.J.

(*e*) (1874) L.R. 19 Eq. 166, at p. 170.

trustees might make payments for needful purposes other than, but without analogy to, those within the narrow confines of "advancement" (*f*). This meant he was able to hold that "benefit" permitted payment for the purpose of the discharge of debts; the type of debt and the long-term advantage which had concerned Page Wood V.-C. in *Boyd* v. *Boyd*, would no longer be a necessary argument, even if in the case of advancement *per se* it were ever valid (*g*). And a few years later Kay J. followed this lead in *Re Brittlebank* (*h*). "Benefit" was "inserted to enlarge the power and give it a wider extension than 'advancement' alone would give" (*i*). On this basis he allowed *inter alia* payment for debts.

This same clause has also permitted payments to the beneficiary for the purpose of supporting those for whose welfare he is legally or factually responsible, or upon whom his welfare depends. In *Re Kershaw's Trusts* (*k*) Malins V.-C. agreed that the words of the power were "very large" (*l*), and allowed payment to the beneficiary so that he might carry on a business in England, and so be able to remain with his wife and children. And in the same year Malins V.-C. approved a similar payment so that the infant beneficiaries were not only allowed their passage costs to New Zealand, where the whole family intended to settle, but their parents were also assisted out of the same fund (*m*). Again, as with debts, it seems arguable that it was the word "benefit"

(*f*) In *Re Livesey's Settlement Trusts* [1953] 2 All E.R. 723, Roxburgh J. appeared to suggest that "benefit" included "mere bounty." "[*Lowther* v. *Bentinck*] shows plainly that words relating to advancement or preferment are much narrower than mere bounty. I think that there is no escape from that. There may be doubt as to what exactly the phrase 'advancement or preferment in the world' means, but it is, I think, settled by authority that it is something more restricted than mere bounty. Therefore, in my judgment, whatever these words mean, they would not cover a payment which was mere bounty" (at p. 726). Compare *Roper-Curzon* v. *Roper-Curzon* (1871) L.R. 11 Eq. 452 ("advancement or preferment"). *Per* Romilly M.R., at p. 453, "I cannot sanction the advance as the matter now stands: you are simply going to give the [beneficiary] a sum of money which he may put into his pocket; but I am disposed to think that, if he executed a settlement, I might then do it." This remark is the sole suggestion before 1951 that the method of payment or application might legitimate the exercise of a power for advancement.

(*g*) *Lowther* v. *Bentinck* adds weight to the contention that *Taylor* v. *Taylor* involved a decision on a point of law.

(*h*) (1881) 30 W.R. 99 ("benefit and advancement").

(*i*) *Ibid.*, at p. 100.

(*k*) (1868) L.R. 6 Eq. 322 ("advancement or benefit"). In *Macleroth* v. *Bacon* (1799) 5 Ves. 159, there was a power to appoint (*inter alia*) for the benefit (solely) of a married woman and her family. Arden M.R. held that in general this power would not include the husband, but, though with reservation, that "family" in the context of the will permitted such an appointment. See especially (at p. 168) the unsolicited utilisation of the analogy of advancement.

(*l*) *Ibid.*, at p. 323.

(*m*) *Re Long's Settlement* (1868) 38 L.J.Ch. 125 ("preferment, advancement, or benefit"). In *Re Brittlebank*, *supra*, Kay J. accepted school fees of the beneficiary's children as within the clause.

alone which enabled the trustees to make payments to persons other than the beneficiary. This would be a development since the opinion of Arden M.R. expressed in *Macleroth* v. *Bacon* (*n*), but a disjunctive reading of "benefit" would confirm this development. It is therefore with more interest that one turns to Farwell J.'s opinion in *Re Halsted's Will Trusts* (*o*). "I consider," he said, "that I am entitled to consider these words disjunctively, and I have to consider whether a settlement made for the benefit of the plaintiff's wife and child would be for his benefit" (*p*). His Lordship came to the conclusion that such a settlement, since it relieved the beneficiary of a "very anxious position" (*q*), was indeed a benefit, though he was of the opinion that such "benefit" would not extend to remoter issue (*r*).

Nevertheless, prior to 1951 the broadest interpretation put upon the "advancement or benefit" clause was in *Klug* v. *Klug* (*s*). In that case, without commenting upon the reasons for his interpretation, Neville J. ordered payment of the legacy duty out of the corpus. Wartime costs and the fall of foreign investment dividends had impoverished the beneficiary, who was therefore unable to meet out of income the whole of the duty. This case marks an unobtrusive but significant milestone.

Section 32

In the light of modern taxation, however, it is undoubtedly under section 32 of the Trustee Act, 1925, that the main development of the notion of benefit is to be expected. It will be recalled that this section speaks of "advancement or benefit," and is to be read into every instrument in the absence of a contrary intention.

There are only four reported cases on the scope of section 32 (1), and only the two latest are directly concerned with "benefit." Clauson J. impliedly agreed in *Re Garrett* (*t*), though the case did turn on this point, that a payment of capital to meet the school fees of an infant beneficiary came within the clause, though it is

(*n*) (1799) 5 Ves. 159.

(*o*) [1937] 2 All E.R. 570 ("or otherwise for his benefit or advancement in life").

(*p*) *Ibid.*, at p. 572.

(*q*) *Ibid.*

(*r*) In a trust being administered by the court Jessel M.R. himself consented to payments for the maintenance of infant beneficiaries, though the express clause spoke only of "advancement in life, or otherwise for the benefit of." These "are large words, as I recently decided in *Lowther* v. *Bentinck*" (at p. 228). See *Re Breed's Will* (1876) 1 Ch.D. 226.

(*s*) [1918] 2 Ch. 67. Neville J. had in fact held in a previous summons that payment for such a purpose was possible under this clause. He made a note of this when subsequently asked to consider whether both the trustees were genuinely exercising their discretion.

(*t*) [1934] Ch. 477. The report also speaks of "other incidental expenses."

surely clear that in any event this was "advancement" proper, while Farwell J. consented in *Re Harris' Settlement* (*u*) to payment for past and future school fees of a similarly situated beneficiary.

Re Ropner's Settlement Trusts (*a*) on the other hand directly raised the point—what did "benefit" include? Consent of the protected life tenant having been obtained, the trustees wished to advance the capital of the reversionary interests to trustees of new settlements of those interests. Harman J. reflected that it was "a perfectly legitimate consideration" (*b*) to attempt to lighten estate duty, but found that in fact none of the infant beneficiaries needed money for themselves or for advancement. Despite this lack of need, however, counsel for the defendants conceded that to hand moneys to the trustees of the new settlements was benefit within the wide terms of the power; the report suggests that "benefit" was interpreted simply as advantage (*c*). His Lordship agreed with this concession, and thought it properly made. The transfer of a contingent share to the trustees of a settlement "must advance [the beneficiary's] interest and thus be for his benefit provided the settlement, on consideration, is thought to be a beneficial one" (*d*).

Two matters of interest arise from this case. First, that mere allocation of money to the beneficiary is a benefit. Harman J. relied upon *Re Vestey* as authority upon what constituted "an application of money"; he did not cite the case as authority for his interpretation of "benefit" (he appears merely to have accepted that "benefit" includes pecuniary acquisition, as he had done in *Re Powles*). It is suggested that the following remark clearly distinguishes between the extent of the power and the method of exercise of the power. In the light of what was "an application of money" in *Re Vestey*, "it must be an application of money to transfer it to trustees of the settlement to be made for the child's benefit" (*e*). Secondly, for the first time in connection with this section, Harman J. stressed the importance of the trustees' discretion in making the payment. Discharge of this duty occurs only if the trustees can show that the particular manner of the payment is advantageous to the particular beneficiary. In this case, since the manner of payment was a new settlement, the terms of the settlement had to be advantageous.

(*u*) (1940) 162 L.T. 358.

(*a*) [1956] 1 W.L.R. 902; the will had no power of advancement, and therefore s. 32 was invoked.

(*b*) *Ibid.*, at p. 905.

(*c*) *Ibid.*, at p. 904.

(*d*) *Ibid.*, at p. 906.

(*e*) *Ibid.*, at p. 906. See, *ante*, Halsbury, *Laws of England*, Vol. 21, para. 387.

Re Moxon's Will Trusts (*f*) confirms this interpretation of *Re Ropner*. The substantial saving in estate duty "is undoubtedly a matter which will enure for [the beneficiary's] benefit. It seems to me that the word 'benefit' is the widest possible word one could have and that it must include a payment direct to the beneficiary." On the following item of discretion Danckwerts J. went on to say, "but that does not absolve the trustees from making up their minds whether the payment in the particular manner which they contemplate is for the benefit of the beneficiary" (*g*).

It is worth noting that both *Re Ropner* and *Re Moxon* referred explicitly to the saving in each case of estate duty. Is it therefore possible to argue that a mere payment to the beneficiary in whatever manner will not constitute "benefit" within the power unless there is a distinct *purpose* to be fulfilled? This argument would exclude idle enrichment, but permit, for example, the saving of estate duty. It is submitted that *Re Vestey* prohibits such an argument.

(c) "Maintenance or benefit"

The distinction between "advancement" and "maintenance" is tolerably clear. Though it has not been so closely analysed as "advancement," and there are possible cases of overlap, "maintenance" has been recognised as a matter of more immediate and recurrent needs. However, it is rare that "maintenance" is the sole purpose in the power. In some cases the phrase "maintenance and education" is used (*h*), but the more typical maintenance clauses are worded as "maintenance or benefit." The addition of the word "benefit" has caused the courts to all appearances to equate "advancement or benefit" with "maintenance or benefit." In *Re Price* (*i*) Cotton L.J. adopted the authority of *Lowther* v. *Bentinck*. But *Re Price*, like *Re Stranger* (*j*), is chiefly interesting because of the attitude of the Court of Appeal towards the word "benefit" as a notion spanning both the extent of the power and the exercise of the discretionary role. In fact *Re Price* is not concerned with the extent of the power, but only with the

(*f*) [1958] 1 W.L.R. 165.
(*g*) *Ibid.*, at p. 168.
(*h*) *e.g.*, *Re Lofthouse* (1885) 29 Ch.D. 921. This did not prevent Cotton L.J. saying (at p. 932) that "the trustees must consider what is most for the benefit of the infant." Clearly a reference to the exercise of their discretion. In *Wilson* v. *Turner* (1883) 22 Ch.D. 521, the power was for "maintenance or education"; in *Re Bryant* [1894] 1 Ch. 324, for "maintenance and education or otherwise for the benefit." However, in *Re Bryant* Chitty J. thought that there was no "substantial difference" (at p. 329) between the language of the two clauses.
(*i*) (1887) 34 Ch.D. 603. See also *Re Churchill* [1909] 2 Ch. 431, where Warrington J. held that an express power for "advancement or otherwise for the benefit" included maintenance.
(*j*) (1891) 60 L.J.Ch. 326.

question of whether the payment of debts could ever be advantageous to a possibly incurable lunatic. "The mere suggestion of a possible benefit is not a benefit . . . [*Lowther* v. *Bentinck*] was clearly for [the beneficiary's] benefit, and the only question was whether it was such a benefit as was contemplated by the power. Here the difficulty is to make out that the proposed application is for the lunatic's benefit at all (*k*). The trustees could not have considered it a case for the exercise of their discretion since the creditors were the only people who would in fact benefit.

In *Re Vestey's Settlement*, however, complete equation between "advancement or benefit" and "maintenance or benefit" is conclusively produced. "Benefit" clearly includes all forms of advancement and maintenance. The trustees, having a power to apply for "support or benefit," had absolute discretion as to whom and what amounts of income to pay among a number of adult and infant beneficiaries. Available income was distributed in part to adult beneficiaries, and the balance declared to be held in specified shares for infant beneficiaries. Had those shares been paid to the infants they would have attracted surtax, so that the trustees desired to accumulate the current income of the allocated shares, as that income arose. However, the Court of Appeal held that section 31 of the Trustee Act did not apply, and the question then became this: was the discretion exercised so that the determination of each share constituted a payment to the infant appellant or an application for his benefit? Evershed M.R. and Jenkins L.J., who alone gave extended judgments (*l*), were divided upon whether such a determination constituted a payment, but were agreed that it was an application for benefit. Evershed M.R. said, "The question then becomes: is a provision that £12,000 shall belong to [X] an application for his benefit? If the question be fairly posed in that way, it seems to me impossible to give any but an affirmative answer" (*m*). Equally, agreeing that the accumulations were invalid, Jenkins L.J. said, "I cannot doubt but that the making of such a provision would be the conferring of a benefit on the infant, so that the application of income for that purpose would be an application for the infant's benefit" (*n*). Since the accumulations were invalid (*o*), and the court was divided on whether "payment" could be made to an infant, the trustees'

(*k*) *Ibid.*, at p. 605. This distinction in *Re Price* is often overlooked.
(*l*) Asquith L.J. associated himself with the judgment of Evershed M.R.
(*m*) [1951] Ch. 209, at p. 220.
(*n*) *Ibid.*, at p. 222.
(*o*) Jenkins L.J. held that not even income arising from income actually allocated could be accumulated, since the effect of such an allocation was to transfer those sums to the estates of the infants—the sums did not remain as trust funds (at p. 224).

allocation of shares was agreed by the entire court to be valid solely on the basis of the above conclusions. The allocation was valid, then, because (1) allocation of a sum to X is a benefit to X, and (2) to make a provision for such allocation is an "application."

Re Vestey constitutes the strongest authority for the recent interpretation of the meaning of benefit, but its importance has only gradually been recognised. In 1954 in *Re Powles* (*p*) Harman J. agreed to a payment by trustees, though the beneficiary wanted the capital solely in order to be "better off" (and presumably rearrange his tax position), because he found *Re Vestey* decided that "income which the trustees might at their discretion apply for the benefit of infants was well applied by handing the income over to the infants" (*q*). With respect, that is correct, but he then went on to say that "that case does not help me at all; there being there an entirely different and a very special power, and nothing which, in my view, illustrates any principle" (*r*). The direct and sweeping nature of this remark has always seemed to the present writer a little strange. Despite the fact that *Re Vestey* concerned an express power, and that the instrument provided a problem of construction, it had never before been argued that "advancement," "maintenance," or "benefit" were not terms, each of which was capable of a consistent meaning. The presumption therefore arose that Harman J. was referring solely to the interpretation of "application" in *Re Vestey*. However, if this presumption were incorrect, how was *Re Vestey* to be dismissed as "entirely different"? Did this mean that "benefit" within *Re Vestey* might not be benefit for a differently worded instrument? Did it further imply that, contrary to Jessel M.R.'s and Farwell J.'s notions, "benefit" was to be read *ejusdem generis*?

To answer these questions it was necessary to go back to *Re Vestey*. In that case it appears from the official report that counsel on neither side argued a case for the meaning of the words "support or benefit." Counsel for the appellants had been content to state that the allocation of shares was "an application of money for the infants' benefit" (*s*). Opposing counsel merely said "that the court might intervene to say what was for the benefit of the infants" (*t*). Evershed M.R. and Jenkins L.J., as has been shown, accepted quite simply that an allocation of income

(*p*) [1954] 1 W.L.R. 336 ("maintenance and general benefit").
(*q*) *Ibid.*, at p. 338.
(*r*) *Ibid.*
(*s*) [1951] Ch. 209, at p. 214.
(*t*) *Ibid.*, at p. 215.

to X was a benefit to X. It would seem, therefore, that the only way in which Harman J. could have regarded "benefit" as peculiar in its use in *Re Vestey* was by a continuing association with *Re Peel* (*u*), and, if the above presumption is indeed incorrect, it is respectfully suggested that *Re Peel* lay at the basis of his unequivocal rejection of *Re Vestey*. Since both Evershed M.R. (*a*) and Jenkins L.J. (*b*) had held *Re Peel* to be irrelevant, it is surely more convincing that what both had to say of "benefit" was said solely in relation to the circumstances under which the application might be made.

Re Vestey received a different interpretation in *Re Ropner*. In the latter case it appeared that Harman J. had narrowed his view on the decision concerning "application" in *Re Vestey*, for he said (*c*) that that case had decided that it was "an application of money merely to set it aside to accumulate for a child's eventual benefit." However, since the Court of Appeal had held that the accumulation was invalid, and the benefit (of allocation) immediate, it is a little difficult to see how his Lordship now viewed his former comments upon what *Re Vestey* decided (*d*). The last word to date upon the subject comes from Upjohn J.'s judgment in *Re Heyworth's Contingent Reversionary Interest* (*e*), and it is submitted that his words adopt almost the complete breadth of *Re Vestey*. "I accept also the argument that the phrase 'maintenance, education or benefit' are words of the widest import. It covers not merely expenditure but capital investment such as the purchase of a house to live in or a share in a partnership, or even in some cases placing of money on deposit for an infant (*In Re Vestey's Settlement*)."

Considerable discussion has been given to *Re Vestey* because not only is it a Court of Appeal authority among a group of decisions of first instance, but because it sanctions the widest

(*u*) [1936] Ch. 161; which concerned a power to "apply" for "maintenance, education, or benefit." *Per* Eve J. (at p. 165) that "the words in question relieve the trustees from the burden of solving such a question [*i.e.*, the scope of the power] if they are satisfied that the expenditure is for his benefit." *Re Peel* decides that "to apply for benefit" does not mean "to retain."

(*a*) [1951] Ch. 209, at pp. 218, 220.

(*b*) *Ibid.*, at p. 222.

(*c*) [1956] 1 W.L.R. 902 at pp. 905, 906.

(*d*) This is important, because, though it now seems that Harman J. considered "application" to be the point at issue in *Re Vestey*, the limits of the power and the manner of exercise can so easily be confused. Halsbury's *Laws*, vol. 21, para. 387, adopts word for word Harman J.'s interpretation in *Re Ropner* of what *Re Vestey* decided, and Halsbury gives this as a meaning of "benefit," *i.e.*, the extent of the power.

(*e*) [1956] Ch. 364, at p. 370. In the recently decided case of *Re Wills' Will Trusts* [1958] 3 W.L.R. 101, at p. 106, Upjohn J. has now confirmed that in *Re Vestey* "the Court of Appeal held that out-and-out allocations to infants were applications for their benefit."

possible interpretation of "benefit" within a power. It is a benefit to B to receive a payment from A (*f*).

But it may well be asked how far this broad interpretation of "benefit" applies to sections of the Trustee Act, 1925, other than section 32.

(1) *Section 53*

This section permits the court to make an order "with a view to the application of the capital or income [of any property] for the maintenance, education or benefit of the infant." There have been but three decisions on this section, and none of them has been directly concerned with the extent of the power. In *Re Gower* (*g*) an infant's reversionary entailed interest was permitted to be mortgaged in order that the child might be maintained, but in *Re Heyworth's Contingent Reversionary Interest* and in *Re Meux* (*h*) "benefit" was involved. In the former, Upjohn J. considered that the sale by an infant of her contingent reversionary interest to the life tenant in return for a lump sum was "most advantageous from the point of view of the infant in almost every conceivable circumstance" (*i*). No order was made simply because a sale of an interest, which in effect broke up the trust, was not within the statutory phrase "with a view to the application of." On the other hand the sale of the entailed interest in *Re Meux* was able to be approved since the sale and the subsequently planned resettlement were held by Wynn-Parry J. to be part of the same transaction. Though the sale would have benefited the infant in whose favour the sale was sought, his Lordship considered that no court would approve of a sale alone when its effect would be so much to the disadvantage of those with interests after the beneficiary seeking the order. The resettlement being "application" within the section, and "overwhelming" (*k*) in its favourable consequences to the infant beneficiary and indeed his successors, the benefit of the initial sale was in fact irrelevant. This sale was a mere inseparable *sine qua non* to the "application" by resettlement.

The restriction upon the section is severe; the courts appear to be agreed that the "application" of this section is narrower than "pay or apply" in section 32 (*l*), which latter phrase would not seem in any way to restrict the exercise of the power. But, accepting such a limitation, it is clear that "benefit" would be satisfied

(*f*) The power of *Re Vestey* being express, the feasible argument that interpretation of statutory powers extends only to those particular powers would be irrelevant.
(*g*) [1934] Ch. 365. (*h*) [1958] Ch. 154.
(*i*) [1956] Ch. 364, at p. 369. (*k*) *Ibid.*, at p. 167.
(*l*) See, in particular, *ibid.*, at p. 166, *per* Wynn-Parry J. For a criticism of this construction see O. R. Marshall (1957) 21 *The Conveyancer and Property Lawyer* (N.S.), pp. 448–454.

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by the intended purpose of making a saving in estate duty. Could it extend further? For example, an infant entitled absolutely to realty on the cessation of an existing life interest seeks an order from the court enabling the sale or mortgage of part of the trust property. His purpose is to purchase an estate of woodland, his spare-time and genuine interest being the study of wild life. The trustees of the settlement are willing to become the new trustees for sale during his minority (*m*). No objection is suggested by the cases.

(2) *Sections 31 and 33*

There are no reported cases on the meaning of "benefit" within sections 31 and 33. But, since the "benefit" of sections 32 and 53 have been similarly interpreted despite the fact that the former is preceded by "advancement" and the latter by "maintenance" and "education," it seems legitimate to suppose that the breadth of *Re Vestey's* interpretation of "benefit" will also extend to sections 31 and 33. Such a conclusion would appear to have far-reaching importance.

It is to be noted that under section 31 (1) (i) the trustees are enabled to exercise the power by paying income to the parent or guardian, if any, and then follows the phrase "or otherwise apply for or towards." What does this phrase mean? Though income may not be paid directly to the infant, it would seem that the phrase is not restricted by the word "application," and that payment may therefore be made to any third person as long as the result is to the infant's benefit. If, for example, the trustees are tied to the statutory investments, can they apply income under the power by investing in equities for the infant? The proviso to subsection (1) appears at first sight to be an immediate stumbling block. The trustees are required to have "regard to the age of the infant and his requirements and generally to the circumstances of the case." These words suggest that "benefit" under section 31 is required to be read *ejusdem generis* with "maintenance" and "education," or at least for need to remain the theme of the power. But it is arguable that "generally to the circumstances of the case" releases the trustees from sole considerations of need, and that these words can be read disjunctively. Admittedly the tenor of the following words of the proviso (*n*) leans against this argument, but that may not be conclusive.

(*m*) Independently, of course, benefit would accrue to the infant from the income tax advantages of woodlands: see (1958) 51 R. & I.T. 72. However, the trustees' position is not easy. In a case like *Re Meux*, and where the infant beneficiary's reversionary interest is absolute, it may be difficult for them to show that the intended settlement of the sums resulting from sale is not colourable.

(*n*) "and in particular to what other income, if any, is applicable for the same purposes."

If this argument is valid, it follows that it is now also possible for trustees to accumulate income excess to need by use of the power to benefit, thus avoiding the restriction to authorised investments in section 31 (2). Moreover, the age limitation of subsection (2) (i) (a) and (b) might in that manner be overcome, thus permitting accumulations to be added to the beneficiary's contingent interest, either in income or capital, rather than to the settlement capital.

In any event, even were "benefit" in this section to be restricted to need, it is clear that trustees may apply income for *any* need, for example, though it be of a non-recurrent character otherwise considered to come within "advancement." However, only income can be applied under section 31, and this limitation in the particular case may be severe. It is at this point that trustees will find section 32 of assistance. The latter section permits capital to be applied for "benefit," and it is noteworthy that with the recent decisions not only can any need, even of a regularly recurrent nature, be met under this power, but any advantage other than need be satisfied with capital. In section 32, unlike 31, there is no proviso, but the section is confined to personalty settlements.

Section 32 permits the application of but half of the presumptive or vested share of capital, and for this reason settlors who wish their trustees to have power to apply the entirety of the share will have to insert an express advancement clause (*o*).

In section 33 there is also no such proviso, and presumably therefore the trustees of the discretionary trusts may exercise the power for a benefit as widely defined as in *Re Vestey*. It would be idle to give examples of the consequent width of this power, since it is apparent that the trustees may make payments of income in favour of and among the beneficiaries for whatever purposes appeal to the trustees. The sole deterrent will be the need to justify the exercise of the discretion in exercising the power, and the availability of suitable methods of payment (*p*). Incidentally the trustees may

(*o*) A precedent for such a power is given *post*, p. 774.

(*p*) The "absolute discretion" and the non-liability to account for the exercise of this discretion, referred to at the end of s. 33 (1) (ii), is to be noted. This makes reference solely to the trustees' choice of the beneficiaries in favour of whom payments are in fact made. As "benefit" is satisfied by mere payment of moneys to or on behalf of the beneficiary, what the beneficiary plans to do with the sum so acquired is a matter for the exercise of the trustees' discretion: see *Re Powles*. In most cases the trustees can be satisfied if they are able to discover a direct benefit to the beneficiary, *e.g.*, the beneficiary desires a lump sum in order to secure his wife's maintenance in expectation of divorce. On the other hand material benefit may accrue indirectly, *e.g.*, the beneficiary seeks to protect his interests, as he believes, by actively opposing a political party, perhaps adopting measures on the lines of the Tate & Lyle "Mr. Cube" campaign. Here also the trustees may well be satisfied. It was earlier suggested in the text that they might be satisfied if, though the benefit is yet more remote, the beneficiary desires money in order to pursue some genuine interest such as the study and preservation of wild life or yachting. The trustees' role will be more difficult, however, when the beneficiary

well find that they are restricted in their exercise of the power by the fact that section 33 (1) (ii) contains the phrase "for the application thereof," but it is difficult to imagine that "application" in this section can impose the restrictions now familiar in section 53 (*q*).

The Nature and Importance of the Trustees' Discretion

It will now be evident that, with the possible exception of section 31 of the Trustee Act, 1925, "benefit" has become divorced from need. Now that need in this connection has gone, trustees making advances for purposes other than need are thereby deprived of the traditional yardstick for showing that they have indeed exercised their discretion. If they could show that they had purposed to satisfy some reasonable need within the power, the courts were not accustomed (so the cases would suggest) to question the trustees further. There are in fact very few cases in which the trustees were challenged as to their discretion, they having already made payments under the power. In *Simpson* v. *Brown* (*r*) the infant beneficiary on coming of age recovered personally against his trustee the sum of the advance which the trustee had made for the purpose of apprenticing the infant. The chosen apothecary was unqualified, and therefore unable to provide a qualifying apprenticeship to the child. In this case the power had been negligently exercised; the purpose, though legitimate, could not be achieved.

In *Re Brittlebank* (*s*), however, the remaindermen sued the trustee (*t*). The instrument contained an express power to make advances up to the entirety of the capital for "benefit and advancement in the world," and the trustee had in fact paid over to the life tenant beneficiary the whole of the capital. Payment had been made in instalments, however, and the trustee said she had always inquired before making the advance the purpose for which the money was wanted, and was always told that it was either for stocking farms or paying debts, school fees, and housekeeping. Kay J. agreed that those purposes were within the power, and considered that she had properly exercised the discretion. The trustee

claims that he will benefit from the satisfying of personal values, and such satisfaction involves the donation of the advanced sums to strangers. It may be that the beneficiary is a Roman Catholic and desires to have Masses said for his deceased relatives, or that the beneficiary desires to assist the work of a charity which has urgent needs. The point is that the trustees *may* make payments for all these purposes.

(*q*) ss. 31, 33 and 53 apply to realty or personalty; s. 32 is restricted to personalty: see s. 32 (2).

(*r*) (1864) 11 L.T. 593.

(*s*) (1881) 30 W.R. 99. See also *Molyneux* v. *Fletcher* (1898) 1 W.B. 648.

(*t*) Others who might sue for breach of trust are reversioners, appointees under a subsequently exercised power, those taking in default of appointment, and members of a class, of whom the beneficiary is one.

had apparently thought she was doing what was intended in trying to set up the tenant for life in a farm, and helping him to support his family; the criterion, thought his Lordship, was that the discretion must not be mischievously and ruinously exercised. Therefore, though it was known to all that the life tenant was a "man of improvident and unsteady character," yet Kay J.'s ultimate attitude towards the exercise of the discretion was contained in his central remark: "What better use could be made of [the money] than to give [the beneficiary] a means of earning a living and supporting his family?" (*u*).

What then is expected of trustees who advance for a purpose other than need? The various decisions which since 1951 have been reported on this phenomenon have spoken only of the trustees "taking into consideration all the factors which they ought to take into account" (*a*), and ensuring that the manner of the payment is "for the benefit of the beneficiary" and is "a proper case for a payment to be made in that manner" (*b*). Clearly this looks for a genuine exercise of the discretion, but emphasises merely that it is a matter of all the facts in each case whether there has or has not been a breach of trust. Though the burden of proof is on the objector, without evidence of need trustees will always have a more onerous task in showing that they should have exercised the power, and that the manner of exercise which they choose was really beneficial. But the possible indiscretion of making payment may be compensated in the discretion employed in the manner of payment. For example, if the trustees know that the beneficiary is "a man of improvident and unsteady character," should they advance other than for need? It seems that they can advance even in these circumstances if they are able to devise a manner of exercise which is reasonably likely to prevent squandering. In the light of *Re Ropner* and *Re Meux* a settlement of those moneys released under a power (whether an express or statutory power) seems the most satisfactory insurance against a subsequent charge of indiscretion, and this would be so whether or not, and, if so, independently of the extent to which the beneficiary is ultimately entitled to capital (*c*). Capital or income might also be made

(*u*) (1881) 30 W.R. 99, at p. 100. "The payment of the money is the important thing—the court does not look to the application": *Boyd* v. *Boyd* (1867) L.R. 4 Eq. 305, *per* Page Wood V.-C.

(*a*) *Re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902, at p. 906, *per* Harman J.

(*b*) *Re Moxon's Will Trusts* [1958] 1 W.L.R. 165, at p. 168, *per* Danckwerts J. See also the caveat in *Re Wills' Will Trusts* [1958] 3 W.L.R. 101, at p. 109, *per* Upjohn J.

(*c*) If the beneficiary is "on the young side, say under thirty," it has been suggested that an exercise of the power in section 32 should take the form of the transfer or payment of the capital moneys to an *ad hoc* trust there to be held in trust "for a period": (1958) 102 S.J. 168. Exercise of the power of advancement

payable if the trustees required initial investments of their own choosing or approval. It might then be possible to put a distringas upon those investments.

On the other hand it must be said that the courts have always been anxious to avoid harassing the trustees in the exercise of their discretion. In general, provided the exercise has been in good faith and not influenced by improper motives (*d*), the courts have not interfered. But most of the cases concern the exercise of a power for sale, and it is therefore uncertain what authority those cases will have in an action under a modern "benefit" payment. At times statements have come from the courts which suggest that the test might go far beyond raising bona fides in a bad case. "No doubt [the court] will prevent trustees from exercising their discretion in a way which is wrong or unreasonable," said Cotton L.J. in a case concerned with a power of sale and of mortgage (*e*), and later Swinfen-Eady L.J. said that it must be seen that the trustees were "acting fairly and properly in the general interest of the estate, and in the interests of all the parties entitled as beneficiaries under the will"(*f*). In *Molyneux* v. *Fletcher* (*g*), though he spoke of the trustees needing to show "no ulterior motive," Kennedy J. yet required that the trustees "must act with a single view to the real purpose and object of the power." Under a power of "advancement for life" the trustees had made payments to a life tenant in order that the life tenant's husband might pay off a debt to one of the trustees. The question of discretion was not considered in isolation, however, since Kennedy J. found that the power did not permit of payments to a beneficiary who was married and with children, and for the particular purpose.

On the existing case law, therefore, it may prove difficult for parties impugning the trustees to establish liability if the discretion has merely been exercised unintelligently, or perhaps even negligently. But with need no longer a guide to the exercise of discretion *Simpson* v. *Brown* might be successfully invoked in a case of negligence causing inadequate or absence of consideration of a factor which would have moved the careful trustee not to exercise the power at all or to exercise it in a reasonably safe-guarding

in the form of the creation of sub-trusts has now been explicitly sanctioned by Upjohn J. in *Re Wills' Will Trusts*, *supra*, especially at p. 108, and with respect this decision must surely be right. But trustees should note that, unless the power expressly authorises delegation, such sub-trustees should not be given powers or discretions other than the ordinary power of advancement.

(*d*) Lewin on *Trusts* (15th ed., 1950), p. 332. See in particular *Re Bryant* [1894] 1 Ch. 324.

(*e*) *Tempest* v. *Lord Camoys* (1882) 21 Ch.D. 571, at p. 580.

(*f*) *Re Charteris* [1917] 2 Ch. 379 (a power of postponement of sale).

(*g*) [1898] 1 Q.B. 648, at p. 654, following *Duke of Portland* v. *Topham* (1864) 11 H.L.C. 32.

manner. Liability for honest folly beyond the point of negligence must be considered a doubtful matter. It is possible to argue that the dicta of Harman and Danckwerts JJ. (*h*) would include conduct of the trustees which while not negligent is unreasonable, but, since the weight of general authority on the exercise of discretionary powers requires mere bona fides, such an interpretation is unlikely (*i*).

In these circumstances, though trustees should approach with some caution, the newly delineated power of advancement for "benefit" is surely attractive.

(*h*) See *supra*, p. 432, notes (*a*) and (*b*).

(*i*) The Restatement of the Law of Trusts adopts a limited criterion:

Section 187, comment (e): The court will not interfere unless the trustee in exercising the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.

comment (h): The court will control the trustee in the exercise of a power where its exercise is left to the judgment of the trustee and he fails to use his judgment. Thus, if the trustee makes no inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim exercises or fails to exercise a power, the court will interpose.

comment (i): The nature of the power conferred by the trust may be unsuggestive of a standard of conduct in exercising or failing to exercise the power. *E.g.*, if power is conferred upon the trustee to appoint income or corpus in favour of a particular beneficiary if he so chooses, without reference to the needs of the beneficiary, the court will not interpose if the trustee acts honestly and from proper motives.

SAFEGUARDS AGAINST CLASS OPPRESSION UNDER SECTION 287 OF THE COMPANIES ACT, 1948

By D. G. Rice, M.A., LL.B., PH.D., Barrister-at-Law

Under section 287 (*a*) where a company is proposed to be or is in the course of being wound up voluntarily and it is proposed to sell its undertaking to another company, the liquidator may, with the sanction of a special resolution, receive in exchange for the undertaking policies, shares and other like interests in the transferee company for distribution among the members of the transferor company. One of the indirect, but nevertheless real, effects of this section is to enable class rights to be varied, and in so doing the way is left open for possible oppression. It is the purpose of this article to examine the safeguards that exist to protect one particular class from oppression at the hands of another. But before we consider the problem it is necessary to explain the method by which class rights may be varied under the section in question.

Although under section 287 the liquidator is empowered to sell the company's undertaking for shares and to distribute them *in specie* amongst its members, there is nothing to say that the rights conferred by the new shares must necessarily correspond in every case to those attaching to the securities held by the members in the old company. And if there is more than one class of members the opportunity presents itself for the prejudicial variation of the rights of a particular class (*b*). For example, suppose a company has two classes of shareholders—preference and ordinary. The company is going through difficult times earning only enough profit to pay the preference shareholders, there being nothing left for the ordinary shareholders. Let us suppose, moreover, as will be the case in most instances, that the ordinary shareholders have voting control at general meetings of the company, so that they are able to pass a special resolution. They can put the company into liquidation and under section 287 compel the liquidator to sell the undertaking for ordinary shares in the transferee company to be

(*a*) Replacing the C. A., 1929, s. 234, the C. A., 1908, s. 192, and the C. A., 1862, s. 161.

(*b*) Strictly speaking, of course, there can be no actual variation of class rights. The class in question will simply receive in exchange for its original interest shares in the transferee company. The rights of the original shares will not be varied. Instead, completely new shares will be received with different rights. However, whatever be the strict analysis of the position, in effect the class in question will suffer a variation of its rights.

distributed among the members of the transferor company. Now the distribution must be in strict accordance with the members' rights on a winding up (*c*). Therefore, assuming the articles have nothing to say on the shareholders' rights on a dissolution, in which case all the members (of whatever class) take equally, or alternatively assuming that the articles expressly provide that on a winding up the assets shall be divided *pari passu* among the members of all classes, the new ordinary shares must be allotted to the preference and ordinary shareholders alike. The effect is obvious. The preference shareholders will no longer enjoy priority in dividends. Their class rights will have been materially affected.

Thus, in *Griffith* v. *Paget* (*d*) where the articles of association provided that the preferred and deferred shareholders should rank equally in the company except in so far as concerned the division of the profits, the rights of the former class were prejudicially affected by a scheme brought under section 287. For the preferred shareholders took equally with the deferred and their position could not be alleviated by the allotment to them of a greater number of shares, for this would have been in contravention of the rights of the classes on a winding up. Moreover, it was not possible to do justice by conferring new preferred and deferred shares on the old preferred and deferred shareholders respectively (*e*), for this, too, would have conflicted with the rights of the classes on a liquidation.

Of course, although *Griffith* v. *Paget* (*d*) was concerned with the prejudicial effect of a scheme under section 287 on the rights of preferred or preference shareholders, sometimes such a scheme will operate to the detriment of the ordinary shareholders or lower classes. Thus, if a company is extremely prosperous, it is probable that the ordinary shareholders are enjoying a far higher dividend than the preference shareholders, and hence these shares will be far more valuable. Assuming that the articles have not made special provision in favour of the ordinary members on a winding up (an assumption which will almost certainly be true), the new shares must be distributed *pari passu* among the preference and ordinary shareholders, and such a distribution will be very much to the latter's disadvantage. Their class rights will have been altered very materially. Of course, in practice it is unlikely that the ordinary shareholders would find themselves in this unwelcome position. A scheme cannot be effected under section 287 without a special resolution, and in most cases—particularly where the

(*c*) See *Griffith* v. *Paget* (1877) 5 Ch.D. 894; 6 Ch.D. 511; *Simpson* v. *Palace Theatre* (1893) 69 L.T. 70 (C.A.).

(*d*) *Supra.*

(*e*) An attempt of this nature was unsuccessfully made in *Simpson* v. *Palace Theatre*, *supra.*

company is prosperous—power will rest with the ordinary shareholders, who would not sanction a scheme to their disadvantage. However, it is possible for controlling power to be vested in the preference shareholders, or alternatively for the latter to hold sufficient ordinary shares to be able to pass a special resolution authorising the liquidator to put into effect a scheme which is to their advantage.

It is clear, then, that class rights may be modified under section 287 by the sale of the company's undertaking for shares and the distribution of these shares *pari passu* among the different classes of members of the transferor company. Moreover, it is equally clear that such modifications may prejudicially affect the rights of a particular class, and this will on the face of it appear inequitable if the class in question did not consent to the scheme. However, from a legal standpoint the class concerned has only itself to blame, as it must be deemed to be aware of its position on a winding up from the articles of association. Jessel M.R. explains the principle as follows in *Griffith* v. *Paget* (*f*):

> "People who enter these . . . articles . . . must be taken to have read them, and to have understood them, and . . . they cannot complain if the contract is afterwards carried out. That appears to be conclusive to any notion of hardship."

It is interesting to note that a scheme under section 287 can also have the effect of modifying the rights of members generally (*g*). This will come about where under the scheme partly paid shares are distributed to members who previously held fully paid shares in the old company, it being quite in accordance with section 287 to sell the company's undertaking for shares having a liability attached to them (*h*). The object of allotting partly paid shares is, of course, to raise more capital, but the obligation attaching to a partly paid share of having to contribute further to the assets of the company materially affects the rights of members. The liability of members has been increased. Of course, in such a case as this any injustice arising will not fall upon any particular class as such, but upon particular members of the company whatever their class. For, although some members will doubtless be quite willing to contribute fresh funds to the company, others will be quite unable to discharge such an obligation (*i*).

(*f*) (1877) 6 Ch.D. at p. 517.

(*g*) As distinct from class rights.

(*h*) See *Re City & County Investment Co.* (1879) 13 Ch.D. 475 (C.A.); *Postlethwaite* v. *Port Phillip & Colonial Gold Mining Co.* (1889) 43 Ch.D. 452; and later discussion.

(*i*) However, no member can be compelled to accept shares with a liability attached or for that matter even without a liability: *Ex p. Bagshaw* (1867) L.R. 4 Eq. 341; *Drew's Case* (1867) 36 L.J.Ch. 785. But if he refuses to accept he

AVOIDANCE OF HARDSHIP

It will be remembered that the means of modifying class rights under section 287 arises out of the necessity for distributing the shares, which have been received in exchange for the company's undertaking, among the members in strict accordance with their rights on a winding up. Thus, in the absence of a provision in the articles to the contrary, preference and ordinary shareholders will take the new shares *pari passu*, as a result of which the interests of one of the classes will be prejudicially affected. Now, is it possible to avoid this hardship by distributing the shares otherwise than in accordance with members' rights on a dissolution? Palmer's *Company Precedents* (*k*) suggests it might be, and gives two ways in which strict compliance with members' rights on a winding up might be avoided. The first method, which has to be operated in two stages, is demonstrated in relation to the following problem. Suppose a company has 100 founders' shares each of which has a nominal value of £1 but a market value amounting to 500 times that sum. Suppose, moreover, that the capital structure of the company also comprises 5,000 £1 ordinary shares worth on the market their par value. Now, if it is sought to reconstruct the company on the basis that a one-class share capital in the new transferee company be allotted to the members of the old transferor company in strict accordance with the market value of their holdings, any attempt to achieve this by a simple sale and distribution under section 287 cannot meet with success in the face of the principle laid down in such cases as *Griffith* v. *Paget* (*l*). It is suggested, however, in Palmer's *Company Precedents* that a twofold manoeuvre might be adopted. First, let the transferee company allot 500 of its £1 ordinary shares in exchange for every one of the founders' shares and then let it acquire under section 287 the transferor company's business on a straightforward one-for-one share basis, undertaking at the same time to make no claim in respect of the founders' shares of which it would now be the beneficial owner.

The other method suggested in Palmer's *Company Precedents*

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will lose all interest in the company. Although this injustice can be avoided in part by a provision authorising the liquidator to sell shares not accepted and to pay the proceeds to those members who refused them, and although, even in the absence of such a provision, members who do not wish to contribute further sums to the company may always accept the shares and then sell them of their own accord, nevertheless in either event it may well be that the market value of shares with a liability will be far below the market value of the original fully paid shares which the members in question previously owned. Thus, members are not fully protected against injustice created by a distribution under s. 287 of partly paid shares in place of fully paid shares.

(*k*) 16th ed., Pt. 2, at p. 895.

(*l*) *Supra*.

is perhaps simpler in principle though in practice far more difficult to implement. It requires all the shareholders to sign an agreement as to the mode of distribution before the winding up is effected. In the event of the shareholders being numerically large, one of their body might act on behalf of all of them subject to the agreement being subsequently ratified by each and every one.

Two methods, therefore, are suggested whereby the shares may be distributed under a scheme brought under section 287 otherwise than in strict accordance with the rights of members. However, there are grave difficulties in adopting either of these methods. As regards the latter, an essential requirement to its success is the unanimous consent of all the members. Although the court does not insist on a formal agreement entered into by all members (*m*), it does, nevertheless, require conclusive evidence that they have agreed to the scheme unanimously (*n*). In practice, unanimous consent will not be forthcoming where one class wishes to prejudice the interests of another. For the latter class will obviously insist upon an allocation of shares in strict accordance with members' rights. It will not consent to any deviation. The result is that, since this method of avoiding strict compliance with members' rights on a winding up cannot be implemented where one class wishes to act unfairly, it is of no help in our search for safeguards against oppressive use of section 287.

Moreover, as regards the first method suggested in Palmer's *Company Precedents* of avoiding distributing shares, which are to be received in exchange for a company's undertaking, among the members in strict accordance with their rights, the whole success of the idea depends upon the willingness of all classes to co-operate. To take the illustration cited, it is useless for the deferred shareholders to enter into a provisional agreement for the sale of their shares to a new company in exchange for shares in the latter, unless the ordinary shareholders are willing to sell the undertaking to the same new company for shares under a scheme brought under section 287. Now, obviously if the ordinary shareholders are trying to oppress the deferred shareholders, they will not co-operate in any arrangement such as that suggested above.

(*m*) Thus, where it was proposed to sell a company's undertaking for shares under s. 287 and a circular was sent, with the notice of an extraordinary general meeting, setting out the proposed mode of distribution if the agreement for the sale was adopted, the approval of the agreement at the general meeting by (presumably) all the shareholders was held to embody approval of the mode of distribution as contained in the circular (*Re Beeston Pneumatic Tyre Co.* [1898] W.N. 35).

(*n*) The mere issue to members of a circular providing for the distribution of shares otherwise than in strict accordance with their rights, will not furnish conclusive evidence of their acceptance of this mode of distribution. There must be some proof that they have approved the contents of the circular unanimously. (*Re North West Argentine Ry.* [1900] 2 Ch. 882.)

So far, then, we have found no adequate protection against the oppressive use of section 287. However, an attempt to remedy this situation is made by subsection (3) of this very section. It provides that a member may, if he gives written notice to the liquidator within seven days, call upon him either to abstain from carrying out the scheme in question or "to purchase his interest at a price to be determined by agreement or by arbitration" (*o*). The object underlying this protection is to safeguard each member against any damage to his interest by a scheme involving the sale of the company's undertaking for shares. The theory is that, if a dissenting member has the right to receive the value of his interest, he cannot be prejudicially affected by the scheme (*p*).

It must be remembered, however, that, if a dissenting member is to take advantage of the protection afforded by section 287, he must comply with the time limit and other provisions laid down by the section. Failure to do so will leave him with two alternatives. Either he must accept the shares (which may have a liability attached) or he must abandon his interest (*q*). But assuming that the conditions of subsection (3) are duly complied with, the protection given by section 287 represents (prima facie) a very substantial safeguard against oppression.

Provisions in memorandum and articles

Nevertheless, this safeguard will be lost if it can be excluded by a company's memorandum or articles. We must consider, then, the effect of a clause in the memorandum or articles purporting to render subsection (3) of section 287 inoperative. We will turn our attention first to the articles. It is quite clear from the authorities that the articles cannot deprive dissentient members of their right to be bought out on the terms laid down in subsection (3). "The articles cannot exclude a shareholder from his right of dissent under [s. 287] of the Companies Act [1948]" (*r*). "The Legislature has conferred on voluntary liquidators a power of selling in a particular way, and it has attached to that power provisions which constitute a safeguard for the protection of dissentient shareholders, and . . . it is not competent for the company by its articles to deprive the shareholders of that protection" (*s*). A clear authority for this

(*o*) In practice it is extremely difficult to give a valuation to the shares of dissentients.

(*p*) *See* Buckley L.J. in *Bisgood* v. *Henderson's Transvaal Estates* [1908] 1 Ch. 743 (C.A.), at pp. 759, 760.

(*q*) See Romilly M.R. in *Ex p. Los* (1865) 34 L.J.Ch. 609, at p. 614; Page-Wood V.-C. in *Higg's Case* (1865) 2 Hem. & M. 657, at p. 665.

(*r*) *Per* Buckley L.J. in *Bisgood* v. *Henderson's Transvaal Estates*, *supra*, at p. 758.

(*s*) *Per* Stirling J. in *Payne* v. *Cork Co.* [1900] 1 Ch. 308, at p. 315.

view is *Baring-Gould* v. *Sharpington Combined Pick & Shovel Syndicate* (*t*) where a clause in the articles provided as follows:

> "If at any time a sale or arrangement shall be made or proposed in pursuance of section 161 of the Companies Act, 1862, the purchase money to be paid for the interest of any dissentient member shall be such sum of money as the liquidator can obtain by selling the shares, stock or other property to which such dissentient member would have been entitled upon the completion of the sale or arrangement had he not expressed his dissent."

Now, this clause clearly conflicted with the stipulation in section 161 (now s. 287) that the price of shares not taken up should be determined by agreement or arbitration. For the clause was not an "agreement" within the meaning of the section, and an arbitrator would not appraise the shares in question solely in the light of what they would fetch in the market. A shareholder was entitled on a dissolution to an aliquot portion of the company's net assets and this would not necessarily correspond to the market value of the shares. Therefore, the clause in the articles conflicted with the method of valuation laid down in section 161 and was held as a result to be ineffective. The *Baring-Gould* case (*u*) is a clear authority for the view that dissentient members cannot be deprived of their rights under subsection (3) of section 287 by any provision in the articles. Moreover, this view has been adopted in the subsequent cases—*Payne* v. *Cork Co.* (*v*) and *Bisgood* v. *Henderson's Transvaal Estates* (*a*).

It is quite clear, then, from the authorities that the articles cannot deprive dissentient members of their rights under subsection (3) of section 287. In fact, the cases go even further. *Ex p. Fox* (*b*) shows that, if a company attempts to modify its articles so as to acquire power to effect a scheme falling within the contemplation of section 287 without giving the dissentients the same rights as conferred by the section, this purported alteration will be invalid (*c*). In the words of Mellish L.J. (*d*):

> "I am of opinion that it is not open to a company, at the moment when it is going to be wound up, to alter its articles

(*t*) [1899] 2 Ch. 80 (C.A.).
(*u*) *Supra.*
(*v*) *Supra.*
(*a*) *Supra. Cf.* also Buckley J. in *Doughty* v. *Lomagunda Reefs* [1902] 2 Ch. 837, at pp. 841, 842.
(*b*) (1871) 6 Ch.App. 176 (C.A.).
(*c*) Quite apart from subs. (3) of s. 287, it is difficult to see how in *Ex p. Fox*, *supra*, the purported alteration to the articles could have been effective, as it would have conflicted with the memorandum. However, the case was not decided on this ground.
(*d*) At p. 192.

for the purpose of carrying out section 161, without the proviso in favour of dissenting shareholders."

We must now consider what effect the memorandum can have on section 287. One thing is clear. As with the articles, when a scheme is brought under section 287 a provision in the memorandum purporting to exclude the operation of subsection (3) or of any other term of section 287 will be ineffective. This rule is implicit in the cases, Buckley L.J. remarking in *Bisgood* v. *Henderson's Transvaal Estates* (*e*):

". . . section 161 contains provisions which, in my judgment, define rights in the members which cannot by any clauses in the memorandum and articles of association be excluded."

Clearly, an Act of Parliament cannot be overridden by the memorandum (*f*). However, can the protection of the section be completely avoided by indirect methods? Can a company by purporting to act under the memorandum carry out a scheme normally brought under section 287, without having recourse to that section with all its safeguards against oppression? Suppose the memorandum of association provides in its objects clause (i) for the sale of the company's undertaking for shares and (ii) for the distribution of these shares amongst its members. Can a company (purporting to act under such a clause in its memorandum) get round section 287 by entering into an agreement for the sale of its undertaking for shares in the purchasing company, it being a condition of the agreement that the shares be directly allotted in specie to the members of the vendor company without any provision being made for dissentients? The answer to this question is clear. The overwhelming weight of authority shows that such an attempt will be ineffective. Although, as we shall see later, a company may under its memorandum sell its undertaking for shares, the agreement governing the sale cannot compel the distribution of the shares received amongst the members of the vendor company. Any distribution effected during the subsistence of the company will amount to a reduction of capital (*g*) and, therefore, will be invalid, whilst in the event of a winding up (taking place simultaneously with the sale) the distribution can only be carried out by the liquidator, whose activities are controlled by section 287, and not by any agreement entered into between the selling and purchasing companies.

(*e*) [1908] 1 Ch. 743, at p. 762.

(*f*) *Cf. Welton* v. *Saffery* [1897] A.C. 299 (H.L.).

(*g*) We are assuming here and throughout the argument that there is a *complete* distribution of *all* the shares direct to the members of the vendor company and that there is no partial retention of them by the company to represent its original share capital. For the effect of an allotment restricted to only so many as are backed by reserves, see later discussion at p. 449.

Therefore, should the agreement in question purport to govern the activities of the directors or liquidator with respect to the distribution of the shares, it cannot fall within the authority of the memorandum, even though the memorandum contains a clause purporting to empower the company to distribute shares in specie amongst its members. Accordingly, an agreement which provides (i) for the sale on a company's dissolution of its undertaking for shares and (ii) for the distribution of these shares amongst the members without regard to the right of the dissentients to be bought out under subsection (3) of section 287, will be ineffective. The memorandum simply cannot authorise such agreements, nor does it matter that they purport to be in accordance with it.

Clear authority for this conclusion is to be found in the cases, the earliest being *Manners* v. *St. David's Gold & Copper Mines* (*h*). Here the memorandum of the defendant company provided under para. (f) that the undertaking might be sold for shares, and under para. (h) that such shares might be distributed in specie among the members of the company without the sanction of the court, so long as the distribution did not amount to a reduction of capital. The defendant company, purporting to act under its memorandum, entered into an agreement with another company, under which its undertaking was to be sold for partly paid shares. These shares were to be offered in specie to the members of the defendant company and, if they refused to accept them, they would find their interest forfeited by the company without compensation. The plaintiff sought a declaration that the agreement was void. The problem, therefore, was whether the agreement, which ran counter to section 287, was within the authority of the memorandum of association and therefore effective. The Court of Appeal (upholding Joyce J.) decided that it was not. Para. (f) only provided for an out-and-out sale of the company's undertaking for shares without the attachment of conditions as to the distribution of the shares (*i*). A surprising feature of this case is the failure of the Court of Appeal to consider the effect of para. (h) read in conjunction with para. (f). Of course, the company could not on the authority of para. (f) distribute the shares in accordance with the terms of the agreement, but might it not do so under para. (h)? The point is not specifically referred to in the Court of Appeal. However, it is clear that the shares could not (in their entirety at any rate) be distributed by the company whilst it was a going concern, as this would amount to a reduction of capital. In fact, Romer L.J. states this (*k*),

(*h*) [1904] 2 Ch. 593 (C.A.).
(*i*) See Cozens-Hardy L.J., at pp. 606, 607.
(*k*) See pp. 604, 605.

although his remarks seem to refer to para. (f). Moreover, conditions could not in the event of a winding up be imposed on the liquidator. Section 161 would apply, and could not be overridden by para. (h).

Two years later the decision of *Manners* v. *St. David's Gold & Copper Mines* (*l*) was followed in *Bisgood* v. *Nile Valley Co.* (*m*), where the facts were substantially as in the earlier case, a clause in the memorandum providing that the company might sell its undertaking for shares in any other company and might distribute in specie any part of its property among its members. Admittedly, Kekewich J. ruled the agreement in this case *ultra vires* on the ground that no member could be compelled to acccept partly paid shares, and that this rule could not be circumvented by granting members the option of taking up the shares, subject to the proviso that, if they were not taken up, they would be sold and the proceeds distributed among the dissenting members. However, it is submitted that his decision would have been precisely the same had the shares been fully paid. So long as the company was a going concern, it could not allot the shares directly to the members for fear of this constituting an improper return of capital, and in the event of a winding up taking place simultaneously with the sale (*n*) the liquidator would be bound, not by the agreement, but by the terms of section 161 (now s. 287). Therefore, the agreement in question which attempted to govern the distribution of the shares was ineffective, even though it purported to be in accordance with the memorandum. Provisions in the memorandum cannot be used to circumvent section 287.

Shortly after *Bisgood* v. *Nile Valley Co.* (*o*) the court had to consider the case of *Fuller* v. *White Feather Reward* (*p*). Here the memorandum was in substantially the same form (with respect to the sale of the company's undertaking for shares and the distribution of the shares among the members) as were the memoranda of the two earlier cases cited above. However, although the company entered into an agreement for the sale of its undertaking for shares, the contract did not purport to require that the shares be directly allotted to its members. Accordingly the court held (*q*) the agreement to be within the authority of the memorandum and, in consequence, to be valid. The case was clearly distinguishable from *Bisgood* v. *Nile Valley Co.* (*o*) and *Manners* v. *St. David's Gold & Copper Mines* (*r*).

(*l*) [1904] 2 Ch. 593 (C.A.).
(*m*) [1906] 1 Ch. 747.
(*n*) Which was in fact the case here.
(*o*) *Supra.*
(*p*) [1906] 1 Ch. 823.
(*q*) See particularly at p. 839.
(*r*) [1904] 2 Ch. 593 (C.A.).

Two years later occurred the leading case of *Bisgood* v. *Henderson's Transvaal Estates* (*s*), the facts of which were substantially those of *Bisgood* v. *Nile Valley Co.* (*o*). The Court of Appeal confirmed the view of the law put forward above, holding that in so far as an agreement purported to direct that the shares received for a company's undertaking be distributed among its members without reference to section 161 (now s. 287) it was *ultra vires*. A " distribution of capital (except in reduction of capital) can only be made in winding up " (*t*), and in this event section 161 must be complied with. Buckley L.J. set out the position as follows (*u*):

> " . . . an agreement for sale and distribution can only be valid when the company ' is proposed to be wound up ' or is in course of being wound up. When the company is proposed to be wound up or is in the course of being wound up section 161 contains provisions which, in my judgment, define rights in the members which cannot by any clauses in the memorandum and articles of association be excluded. If the company is proposed to be wound up and the transaction is a sale and distribution, then, in my opinion, the statute provides that sale by conversion into money may be replaced by exchange for shares upon the terms, but only upon the terms, of complying with the provisions of section 161. It has been decided . . . that part of section 161, namely, the right of the member to dissent, cannot be excluded by the articles, but the argument before us is that the whole of section 161 may be excluded. I think not."

It is quite clear, then, from the cases that the memorandum cannot be used to authorise agreements which attempt to circumvent the terms of section 287 (*v*).

Sale of undertaking

However, the above conclusion in no way affects a company's right to enter into an agreement for the sale of its undertaking for shares in the purchasing company. Although such an agreement must not attempt to provide for the distribution of the shares, this fact in no way prejudices the company's right to sell its undertaking for shares, if the memorandum so allows. Thus, in the

(*s*) [1908] 1 Ch. 743 (C.A.).
(*t*) *Per* Buckley L.J., at p. 762.
(*u*) At p. 762.
(*v*) The one case to the contrary—*Cotton* v. *Imperial & Foreign Agency & Investment Corpn.* [1892] 3 Ch. 454—where Chitty J. held that s. 161 (now s. 287) was only procedural in nature having no effect on a company's right under its memorandum of distributing shares on a winding up without regard to the safeguards conferred by the section, has not been followed in subsequent cases and was specifically overruled by *Bisgood* v. *Henderson's Transvaal Estates*, *supra*.

early case of *Cotton* v. *Imperial & Foreign Agency & Investment Corpn.* (*w*), Chitty J. said (*x*):

> "Instead of selling for money, this company by its memorandum says that the sale may be for shares in another company. I see nothing unlawful in that whatsoever."

In two subsequent cases—*New Zealand Gold Extraction Co.* v. *Peacock* (*y*) and *Grant* v. *United Kingdom Switchback Rail. Co.* (*a*) —whose decisions depended upon the validity or otherwise of agreements of the kind under discussion, the court held the agreements *intra vires* and therefore valid. Similarly, in *Manners* v. *St. David's Gold & Copper Mines* (*b*), *Bisgood* v. *Nile Valley Co.* (*c*), *Fuller* v. *White Feather Reward* (*d*) and *Bisgood* v. *Henderson's Transvaal Estates* (*e*), the court admitted that a company whose memorandum so permitted might sell its undertaking for shares in the purchasing company. Moreover, the shares need not necessarily be fully paid. "If a company has power to sell for shares, it may well sell for partly paid shares in that other company" (*f*). "There is no reason in the nature of things why a company whose objects include subscribing for, taking and holding shares should under an authority to sell for shares be precluded from taking shares partly paid" (*g*).

Furthermore, one other feature of a company's right to sell its undertaking under the memorandum for shares, paid or partly paid, must also be adverted to at this point. It is immaterial if the agreement for sale is entered into at a time when the company contemplates winding up. The agreement is still valid, provided, of course, the memorandum allows it. This view is implicit in the judgment of Buckley J. in *Doughty* v. *Lomagunda Reefs* (*h*), where, after having considered whether a particular sale was effected by the company or its liquidator, he continued as follows (*i*):

> "Then, was it a sale which the company could properly make? It is unquestionably . . . a sale which required that the company should go into liquidation. . . . It is true that there

(*w*) *Supra.*
(*x*) At p. 458.
(*y*) [1894] 1 Q.B. 622 (C.A.).
(*a*) (1888) 40 Ch.D. 135 (C.A.).
(*b*) [1904] 2 Ch. 593 (C.A.).
(*c*) [1906] 1 Ch. 747.
(*d*) [1906] 1 Ch. 823.
(*e*) *Supra.*
(*f*) *Per* Kekewich J. in *Bisgood* v. *Nile Valley Co.*, *supra*, at p. 758.
(*g*) *Per* Buckley J. in *Mason* v. *Motor Traction Co.* [1905] 1 Ch. 419, at p. 426. See also Vaughan Williams L.J. in *Booth* v. *New Afrikander Gold Mining Co.* [1903] 1 Ch. 295 (C.A.), at p. 313, and Warrington J. in *Fuller* v. *White Feather Reward*, *supra*, at pp. 831, 832.
(*h*) [1902] 2 Ch. 837.
(*i*) At pp. 843, 844.

> are stipulations in the agreement in the present case which, as far as I can see, could not be thoroughly worked out except on a winding up. . . . But does that make the sale any the less a sale by the company? I do not think it does. . . .
>
> "... After this company had executed this agreement, if it had not gone into liquidation the agreement would still, I apprehend, have been capable of being enforced against them."

And in *Fuller's* case (*k*) Warrington J. expressed himself in similar terms (*l*). It is quite clear, then, from the cases, that (i) where the memorandum so provides, a company may sell its undertaking for shares, which need not necessarily be paid up, in the purchasing company and (ii) that the position is unaffected if the agreement is entered into at a time when the liquidation of the company is in contemplation.

Unfortunately, the unanimity of the decisions which have given rise to the above conclusions is somewhat marred by certain dicta in the latest case—*Etheridge* v. *Central Uruguay Northern Extension Ry.* (*m*)—which was decided in 1913. Joyce J., in holding that a company could not sell its undertaking for shares under a power in its memorandum, observed as follows (*n*):

> "The defendants in effect say that the memorandum and articles, and, indeed, the memorandum of association, contain sufficient authority without any winding up or special resolution to transfer the whole business or property for shares in the purchasing company. If that argument were sound I do not see why the memorandum should not also authorise a distribution or allotting of the shares amongst the shareholders of the selling company."

It will be noted from the extract quoted above that Joyce J. fails to make any distinction between a power under the memorandum to sell the company's undertaking for shares and a power under the memorandum to distribute these shares amongst the members. In the view of the learned judge, if a company can by virtue of its memorandum sell its undertaking for shares, it can likewise under its memorandum allot the shares received to its members without regard to section 192 (now s. 287). This is a *non sequitur*. As has been explained above, if the shares are distributed whilst the company is still a going concern (*o*), this will constitute an improper return of capital (unless, of course, section 66 has been complied

(*k*) *Supra.*
(*l*) At pp. 831, 832. See also *Cotton* v. *Imperial & Foreign Agency & Investment Corp.* [1892] 3 Ch. 454.
(*m*) [1913] 1 Ch. 425.
(*n*) At p. 436.
(*o*) *i.e.*, in their entirety: see note (*g*) at p. 442.

with), whilst if they are distributed on a winding up that takes place simultaneously with the sale, they must be allotted by the liquidator, who will be bound by the terms of section 287. A company cannot directly allot the shares, even though its memorandum purports to confer this power. Difficulties of this nature, however, do not apply where a company seeks under its memorandum merely to sell its undertaking. It is submitted that this failure on the part of Joyce J. to appreciate the different circumstances governing the sale of the undertaking for shares and the distribution of these shares among the company's members, has caused the learned judge to say, not only that the company cannot allot directly to its members the shares received for its undertaking, but also that the company cannot even sell the undertaking for shares in the first place. However, whether or no this be a correct explanation of how the conflicting dictum of Joyce J. came about, it is quite clear that it cannot stand in the light of the previous authorities, which include Court of Appeal decisions. The memorandum can confer power on the company to sell its undertaking for shares (paid up in full or in part), and this regardless of whether the winding up of the company is in contemplation at the time of the sale.

Circumvention of section 287

We have now reached a vital stage in our examination of the question whether the protection given to the minority under subsection (3) of section 287 can be circumvented. We have concluded so far that the safeguards of section 287 cannot be excluded directly by a provision to that effect in the memorandum or indirectly by a clause in the memorandum purporting to empower the company to enter into an agreement for the sale of its undertaking for shares and for the simultaneous distribution of these shares in specie among the members without regard to the requirements of section 287. However, can the dissentients be deprived of their protection if the company goes about the matter in another way? Can it circumvent the safeguards of section 287 if it first sells its undertaking for shares under the memorandum and then immediately afterwards (though as a separate act) goes into voluntary liquidation and instructs the liquidator, assuming the articles so allow (*p*), to distribute the shares in specie? For if it can, the safeguards of section 287 will have been sidestepped.

The problem has been considered by the learned editor of Palmer's *Company Precedents*, who seems to suggest (*q*) that the protection conferred by section 287 cannot be got round in this way.

(*p*) *Cf.* art. 135 of Table A.
(*q*) At p. 924 of Pt. 2 (16th ed.).

He observes that " if a dissentient shareholder could prove that the selling company was ' proposed to be wound up ' and more particularly if the shares in the new company are not fully paid up, the case might be held to fall within the principle, though not the actual decision, in the *Bisgood* case " (*r*). It is submitted, however, that the onus of proving this viewpoint rests with the learned editor. Prima facie, if a company can sell its undertaking for shares, and then go into liquidation, allotting the shares in specie to its members, section 287 has no application. The burden of proof falls on those who assert otherwise. Now what authority can be cited to support the learned editor of Palmer's *Company Precedents*? There is none. Moreover, there are authorities which run directly counter to his suggestion. As has been explained above, such cases as *Cotton* v. *Imperial & Foreign Agency & Investment Corpn.* (*s*), *Doughty* v. *Lomagunda Reefs* (*t*) and *Fuller* v. *White Feather Reward* (*u*) show that a company may by virtue of its memorandum of association sell its undertaking for shares fully or partly paid up even though at the time of sale the liquidation of the company is contemplated. In such circumstances, section 287 has no application. Further, there is nothing to prevent a subsequent liquidation involving the distribution of the shares in specie. It is submitted, then, that despite the opinion of the learned editor in Palmer's *Company Precedents*, the authorities seem to indicate that a company may, without regard to section 287, sell its undertaking for fully or partly paid shares even though it intends to and does in fact subsequently wind up, and may subsequently as a completely distinct and separate action direct on its dissolution that the liquidator distribute the shares in specie among its members. It is submitted that, if the company adopts this course of action, it will successfully get round subsection (3) of section 287, and the shareholders who do not assent to the sale and distribution will lose their right to be bought out. It follows from this that potential subscribers to an issue must examine the memorandum carefully to see if it empowers the company to sell its undertaking for shares. If it does, they must, before subscribing, take into account the consequences that may emanate from such a provision in the memorandum.

Finally, it is necessary for us to consider a variant of the above method of avoiding strict compliance with subsection (3) of section 287. Suppose the vendor company by virtue of the powers conferred on it by the memorandum sells its undertaking for shares

(*r*) [1908] 1 Ch. 743.
(*s*) [1892] 3 Ch. 454.
(*t*) [1902] 2 Ch. 837.
(*u*) [1906] 1 Ch. 823.

in the purchasing company but agrees that only part of the shares are to be directly allotted to its members, the remainder being retained by the vendor company itself to represent its original share capital. In this event, there will be no winding up of the vendor company so that section 287 is inapplicable and at the same time there will be no return of capital in its technical sense. There would not appear to be any reported case dealing with this situation. But logically it would seem that if the memorandum permits, as it usually will, the payment of dividends in the form of shares instead of cash, there is nothing to prevent an agreement, validly entered into for the sale of the vendor company's undertaking for shares, containing a condition that the shares shall be directly allotted to its members subject nevertheless to the retention by the company of enough shares to represent the amount of its original capital. Provided this course is adopted there will be no illegal return of capital and at the same time section 287 (and *a fortiori* the protection of subs. (3)) cannot apply. In due time, of course, the vendor company can be wound up and the remaining shares distributed (*v*).

Summary

We see, then, that section 287 may be used to modify class rights. This can be done by the company going into liquidation and authorising the liquidator to sell its undertaking for shares in the purchasing company and to distribute them among its members in strict accordance with their rights on a dissolution. And a strict adherence to the rights of each member on a winding up may well result in injustice to a particular class which happens to enjoy during the company's subsistence a priority of dividend or some other similar advantage. In order, therefore, to protect such a class from being oppressed by a scheme brought under section 287, subsection (3) of this section confers upon each of the class members the right to be bought out on the terms there laid down. This right cannot be directly excluded by the memorandum or articles, or indirectly circumvented by a provision in the memorandum purporting to empower the company to sell its undertaking for shares and simultaneously to distribute them in specie amongst its members. It is submitted, however, that the protection against

(*v*) Pending this action, however, the position of shareholders with prior claims during the company's subsistence will be better protected in so far as the dividends received from the purchasing company in respect of the shares retained by the selling company will be available to discharge these prior claims. But the extent to which this is of significance will depend on the proportion of the shares of the purchasing company retained to represent the original share capital of the vendor company and the willingness of the latter company to declare dividends on its own original shares.

oppression afforded by subsection (3) can be sidestepped, if the company, instead of trying to sell its undertaking for shares and to distribute them to its members in one single transaction, first sells its undertaking under a power in its memorandum (which it may do) and then subsequently, as a completely distinct and separate action, goes into voluntary liquidation. Both the sale under the memorandum and the subsequent liquidation will be effected without reference to section 287, and the way is wide open for class oppression. Moreover, an identical result will be arrived at if on a sale of the undertaking an immediate distribution is made to the members of the vendor company, subject to a temporary retention by the company pending dissolution of enough shares to represent its original share capital.

THE ENFORCEMENT OF PLANNING CONTROL: FURTHER DECISIONS

By Desmond Heap, ll.m., p.p.t.p.i.,
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In this journal (*a*) there appeared an article on "The Enforcement of Planning Control." Part V of that article (headed "Appealing Against an Enforcement Notice") quoted a number of decisions of the courts on this particularly difficult aspect of planning control, through the medium of enforcement notices, over unauthorised development. Since the publication of the article there have been further judicial decisions which bear on those quoted and it is the object of this article to deal with these further decisions and thereby bring the earlier article more nearly up to date.

By way of recapitulation it may be stated that the two sections of the Town and Country Planning Act, 1947, dealing with enforcement notices are sections 23 and 24 and that under section 23 (4) an appeal to the justices may be made by a person who is served with an enforcement notice. On receipt of such an appeal the justices, according to section 23 (4), can do but one of three things, that is to say they can—

(1) *quash the enforcement notice* if planning permission for what has been done was either not needed at all or was granted automatically under the provisions of the Town and Country Planning General Development Order, 1950, relating to "permitted development" (*b*); *or*

(2) *vary the conditions of the enforcement notice* if, in their opinion, the notice goes too far in requiring more works to be done than are reasonably necessary to secure compliance with planning control (*c*); *or*

(3) *dismiss the appeal* and thereby uphold the enforcement notice.

If the justices do not do either (1) or (2) above then they are *bound* to do (3); in other words, they are *bound* to uphold the enforcement notice by dismissing the appeal for they have no discretion to do otherwise.

(*a*) (1957) Vol. 21, 180.
(*b*) s. 23 (4) (a).
(*c*) s. 23 (4) (b).

Such is the effect of the restrictive terminology of section 23 (4), and if every person who received an enforcement notice promptly appealed to the justices against it some of the difficulties which now besprinkle the enforcement scene would not exist. But not every person who gets an enforcement notice appeals against it under section 23 (4) and it was held by a Divisional Court in *Perrins* v. *Perrins* (*d*)—a criminal case taken under section 24 (3) of the 1947 Act—that the defendant, not having challenged, under section 23 (4), the enforcement notice with which he had been served, could not subsequently challenge the validity of the notice by way of defence to criminal proceedings taken against him under section 24 (3). In the civil case of *Francis* v. *Yiewsley and West Drayton Urban District Council* it was held by McNair J. on March 8, 1957, in the High Court (Chancery Division) (*e*) that, notwithstanding *Perrins'* case, a failure to appeal against an enforcement notice under section 23 (4) did not act as a bar to subsequent action by the recipient of the enforcement notice for a declaration that the notice was invalid. Accordingly, McNair J. granted the recipient the declaration which he sought.

Turning now to events which have followed the previous article, the first case which calls for attention is *Norris* v. *Edmonton Corporation* (*f*). This case came on *after* the decision in *Francis* v. *Yiewsley* had been given in the High Court but *before* that decision came up for review on appeal to the Court of Appeal. In *Norris'* case (a criminal case like *Perrins'*) a Divisional Court, following its own decision six years earlier in *Perrins'* case, held that objections to the validity of an enforcement notice could not be used as a defence to a prosecution under section 24 (3) if they could have been used, but in fact were *not* used, by way of challenging the enforcement notice under section 23 (4). Thus the two cases of *Francis* v. *Yiewsley* (in the High Court) on the one hand and *Norris* v. *Edmonton Corporation* (in the Divisional Court) on the other serve to illustrate the contradictory outcome of instituting civil process and criminal process respectively in connection with the enforcement of planning control through the medium of an enforcement notice.

If McNair J. in *Francis'* case cast doubt on the decision in *Perrins'* case, the Court of Appeal, when the decision in *Francis'* case came before it (*g*) was more trenchant in its observations. In dismissing the appeal against the declaration granted in the High Court by McNair J., that the enforcement notice was bad notwithstanding that the plaintiff had not challenged the notice by way of

(*d*) [1951] 2 K.B. 414.
(*e*) [1957] 2 W.L.R. 627.
(*f*) [1957] 3 W.L.R. 388.
(*g*) [1957] 3 W.L.R. 919.

appeal under section 23 (4) when he had the chance of so doing (*i.e.*, during the period between the service of the notice and its coming into effect), Jenkins L.J. declared (*h*): "It was said that the plaintiff, having failed to avail himself of his right of appeal, could not now litigate the matter before the judge or before this court . . . the relevant provision . . . is . . . section 24 (3). That provides for the prosecution and punishment by fine of persons who failed to carry out an enforcement notice in cases in which, by virtue of an enforcement notice, any use of land is required to be discontinued. That subsection contains no limitation at all on the arguments that the person prosecuted can put forward, whether or not they are arguments which he might have taken on an appeal. In these circumstances, I cannot accept the view that the plaintiff is barred from the remedy that he seeks by way of declaration. I appreciate that that view is in conflict with the decision in *Perrins* v. *Perrins* . . . the simple answer is that *Perrins* v. *Perrins* was wrongly decided." With this judgment of Jenkins L.J. Parker and Pearce L.JJ. concurred.

But *Perrins* v. *Perrins* is not the only enforcement case which must now be regarded as "wrongly decided." So also must *Norris* v. *Edmonton Corporation*!

The decision in *Norris*' case derives from two earlier cases (already referred to in the earlier article) namely, *Keats* v. *London County Council* (*i*) and *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.* (*k*). In *Keats*' case it was held by a Divisional Court, relying on the restrictive terminology of section 23 (4), that on an appeal to the justices under that subsection against an enforcement notice served under section 23 (1), it was not open to the justices to inquire whether in fact "development" (as defined in section 12 of the 1947 Act) had been carried out but that, on the contrary, the justices were required to assume that the development alleged in the enforcement notice had in fact taken place. Such was the position, founded on the authority of *Keats*' case, in 1954, but in 1957 came the House of Lords decision in the *East Riding County Council* case which was thought in effect, if not in express terms, to have overruled the decision in *Keats*' case. This was the view of the *East Riding County Council* case which the Divisional Court took in *Norris*' case. In *Norris* v. *Edmonton Corporation* the plaintiff wished to challenge the enforcement notice which he had received on the ground that what he had done (and of which complaint was made in the notice) was not development within the 1947 Act at all. Faced with the decision in *Keats*' case

(*h*) [1957] 3 W.L.R., at 927.
(*i*) [1954] 1 W.L.R. 1357.
(*k*) [1957] A.C. 223.

the plaintiff Norris felt it would be idle to challenge the enforcement notice by way of appeal under section 23 (4) and did not do so. On the contrary, he waited until he was prosecuted for failing to comply with the enforcement notice and *then* sought to make his point about what he had done not being development at all and the enforcement notice being accordingly bad. But it was held against him that *Keats'* case had been impliedly overruled by the *East Riding County Council* case and that Norris' point about what he had done not being development at all was a point which *could* have been taken before the justices in an appeal to them by Norris under section 23 (4). Not having been so taken the Divisional Court (following its own 1951 decision in *Perrins'* case) held that the point could not thereafter be raised by way of defence to a prosecution under section 24 (3). (It will be noted that the Divisional Court did not hesitate to follow the precedent of *Perrins'* case notwithstanding the doubts cast upon the latter by McNair J. in the High Court in *Francis* v. *Yiewsley and West Drayton Urban District Council.*)

This, however, is not the end of the matter, for in the important case of *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.* (*l*) it was held by a Divisional Court (Hilbery and Donovan JJ., Lord Goddard C.J. dissenting) that on an appeal under section 23 (4) to the justices by a person served with an enforcement notice, the court has no jurisdiction to determine whether the matters referred to in the enforcement notice as being development did or did not constitute development under section 12 of the 1947 Act and that in so far as section 17 (2) of the Act contemplates an appeal to the justices on this very question, it is repugnant to section 23 (4) and the latter enactment prevails. This restores the position as given in *Keats'* case in 1954 from which it appears that the plaintiff in *Norris'* case was quite right to wait till he was prosecuted before raising his point that what he had done was not development at all. The plaintiff lost his case, but it now appears that *Norris'* case (like *Perrins'* case) was wrongly decided. In short, the position after the *Eastbourne* decision is (*per* Hilbery and Donovan JJ.), that *Norris* v. *Edmonton Corporation* (in following *Perrins* v. *Perrins* which was specifically overruled by the Court of Appeal in *Francis* v. *Yiewsley and West Drayton U.D.C.*) was wrongly decided and must accordingly be regarded as no longer law. On this Donovan J. stated in the *Eastbourne* case: " I agree it is a peculiar position if the occupier has to wait to be prosecuted before he can challenge the planning authority's view that development has occurred, and that, as the law stands at present, the justices

(*l*) [1958] 2 W.L.R. 886

will then do, under section 24 (3), what they cannot do under section 23 (4), namely, inquire whether development has occurred. But at least that is better for the occupier than nothing at all; and, in some cases, he may also be able to proceed for a declaratory judgment. However, that may be, I think the words of section 23 (4) strictly confine the justices' jurisdiction under that section to the issues there specified." As stated above, Lord Goddard dissented from the decision in the *Eastbourne* case in respect of which leave to appeal was given. It should be noted that while the decision in the *Eastbourne* case stands it will not be possible to argue on an appeal to the justices under section 23 (4) (as was done in *Taylor* v. *Eton Rural District Council* (*m*) and *Penny & Others* v. *Guildford R.D.C.* (*n*)) that a mere intensification of a use (*e.g.*, the increasing from, say, ten to fifteen of the number of caravans accomodated in a field in respect of which planning permission for ten caravans has been granted) does not amount to a material change of use and therefore does not constitute development under the 1947 Act for which enforcement action will lie.

Miscellaneous points

Three further recent cases remain to be mentioned in connection with this matter of the enforcement of planning control by means of enforcement notices.

In *Fyson* v. *Buckinghamshire C. C.* (*o*) the enforcement notice related to a use of land (as distinct from a building operation on land) and required the landowner to discontinue a particular use of certain land which use, after a long interval, he had resumed. The landowner appealed against the notice and the question was whether the appeal should be allowed on the ground that no "development" of the land had taken place having regard to the definition of "development" in section 12 of the 1947 Act. The justices held that there had been no material change in the use of the land and the Divisional Court affirmed the justices' decision. In short, the justices in this case *did* go into the matter of whether that which the enforcement notice complained about did, or did not, constitute development under the 1947 Act and they concluded that it did not. It must be noted that the appeal in this case to the Divisional Court was heard and decided *after* the arguments in the *Eastbourne* case had been heard but before the judgment in that case had been delivered. Accordingly, the decision in *Fyson's* case, so far as it touches the jurisdiction of the justices,

(*m*) [1958] J.P.L. 204.
(*n*) [1958] J.P.L. 202.
(*o*) [1958] 1 W.L.R. 634.

on an appeal under section 23 (4) of the 1947 Act, to determine whether there has in fact been any development of land affected by an enforcement notice, must now be considered in the light of the decision in the *Eastbourne* case.

In *Att.-Gen., ex rel. Egham Urban District Council* v. *Smith, Modern Trailer Homes, Ltd., and Pearlberg* (*p*), the recipients of an enforcement notice relating to the use of land as a caravan camping ground, having been convicted and fined under section 24 (3), sought to defy the intent of the 1947 Act by moving their caravans into an adjacent field when further enforcement proceedings were threatened. Accordingly, an injunction was granted to prevent the defendants from using any land within the boundary of the Urban District of Egham without first getting planning permission under the 1947 Act. This decision follows that in *Att.-Gen.* v. *Bastow* (*q*).

It was held in *Morecambe & Heysham Borough Council* v. *Warwick* (*r*) that the service of an enforcement notice not at the place where the developer lives, or last lived, but at his place of business where it was received by a person who promised to pass it on to the developer, was a good service of the notice under section 105 of the 1947 Act even though the developer was able to show that he never in fact received the notice.

(*p*) [1958] J.P.L. 517.
(*q*) [1957] 2 W.L.R. 340.
(*r*) [1958] J.P.L. 590.

BONUS SHARES AND THE REVENUE

By J. R. Lingard, ll.b.

The House of Lords has held in *I. R. C.* v. *Blott* (*a*) that where a company passes a resolution capitalising its accumulated profits in accordance with the Companies Act and its articles of association, this renders the profits capital for all purposes. Furthermore, the Privy Council held in *C. I. T. Bengal* v. *Mercantile Bank of India, Ltd.* (*b*) that the personal motives of the individual shareholders in voting for such a resolution are irrelevant. Consequently, a subsequent distribution of the bonus shares is not income in the hands of the shareholders and does not attract surtax. However, where a company distributes not its own shares but shares in another company, such a distribution is regarded as income and assessable to surtax: *Pool* v. *Guardian Investment Trust Co., Ltd.* (*c*). It should also be remembered that the company's profits will have borne income tax at the standard rate prior to capitalisation so that the primary tax advantage derived from a bonus issue is the avoidance of surtax.

Viscount Haldane explained his decision in *I. R. C.* v. *Blott* (*d*) in these words: "I think that it is . . . within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and . . . not distribute them at all, but apply them in paying up [shares]. If this be done, the money so applied is capital and never becomes profits in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But . . . *his new shares do not give him any immediate right to a larger amount of the existing assets.* [They] simply confer a title to a larger proportion of the surplus assets, if and *when a general distribution takes place, as in a winding up.*"

In *I. R. C.* v. *Wright* (*e*) the company, after capitalising its profits, had given its shareholders an option either to accept the new shares as a bonus or to take their nominal value in cash. The Court of Appeal extended the rule in *Blott's* case (*a*) and held that

(*a*) [1921] A.C. 171.
(*b*) [1936] A.C. 478.
(*c*) [1922] 1 K.B. 347.
(*d*) [1921] A.C. 171 at p. 184.
(*e*) [1927] 1 K.B. 333.

shareholders who accepted the bonus were not assessable to surtax in respect thereof; though those shareholders who elected to take the cash would be assessable: *I. R. C.* v. *Coke* (*f*). Lord Hanworth M.R., while emphasising that he had to consider the substance of the matter, considered himself bound by authority to hold that the mere existence of an option did not prevent the process adopted from being one of the distribution of capital.

Redeemable Preference Shares and Redeemable Debentures

Difficulties have arisen from attempts to extend the rule in *Blott's* case (*a*) to a redeemable bonus issue. It may be noted at the outset that the possible distinction between redeemable preference shares and redeemable debentures is immaterial. As Viscount Cave L.C. said in *I. R. C.* v. *Fisher's Executors* (*g*): "It is impossible to escape from the conclusion that the issue of debenture stock in the present case falls within the same category as the issue of shares in *Blott's* case."

It is submitted that where a shareholder can immediately enforce repayment of bonus shares or debentures, the issue will be treated as income in his hands and will be assessable to surtax, even if he does not in fact elect to redeem. The decision in *I. R. C.* v. *Wright* (*e*) may appear to be some authority to the contrary, but it seems clear from the above extract from *I. R. C.* v. *Blott* (*h*) that that case turned upon the absence of an immediate right for the shareholder to obtain a larger amount of the company's existing assets. It should also be noted that Viscount Cave L.C. in *Fisher's* case (*i*) stressed that the recipients of the bonus debentures he was considering had "no power to call in the stock."

In the majority of cases, however, a bonus issue of redeemable preference shares or redeemable debentures can only be redeemed at the option of the company and therefore does not confer an immediate right to a larger amount of the company's existing assets. On the other hand, on the redemption of the bonus issue, cash may well pass into the shareholders' hands "before a general distribution takes place." Does this possibility that the shareholder may be enriched prior to a winding up affect the surtax position?

The bonus issue

The general rule is that a bonus issue redeemable only at the option of the company is capital in the hands of shareholders and

(*f*) [1926] 2 K.B. 246.
(*g*) [1926] A.C. 395, at p. 403.
(*h*) [1921] A.C. 171.
(*i*) *Post*, p. 460.

not assessable to surtax. In the leading case of *I. R. C.* v. *Fisher's Executors* (*g*), the company had capitalised part of its accumulated profits and distributed them among its shareholders in the form of 5 per cent. debenture stock. The House of Lords held that this bonus did not render shareholders liable to surtax, even though the conditions of issue made the stock redeemable at the option of the company six years after the date of issue.

Viscount Cave L.C. (*k*) adopted the following passage from *Pool* v. *Guardian Investment Trust Co., Ltd.* (*c*): "The true test as to whether a distribution of shares falls to be taxed depends upon two questions: (1) whether there has been a release of assets; (2) if so, whether the assets released were capital or income."

He continued: "The company was, therefore, master of the situation, and it elected definitely and *irrevocably* not to distribute the fund as income, but to impound and apply it as income producing capital; and that election, *if made in good faith*, was binding on the shareholders and could not be questioned by the Crown. No doubt, the shareholders got . . . a valuable thing; but, *they had no power to call in the stock* . . . no present right to receive any part of the company's assets . . . but only entitled them to a sum to be carved out of those assets *if and when the stock was paid off*." He considered that the bonus issue involved no release of assets, either as income or as capital.

In *Fisher's* case the debenture stock was irredeemable in normal circumstances for six years after the issue. The limitations to the rule were discussed in the important case of *Aykroyd* v. *I. R. C.* (*l*). In that case, the appellant had transferred his stock in an American company to two Canadian companies. The American company issued debentures redeemable at any time on its giving thirty days' notice and the Canadian companies remitted the cash equivalent to the appellant. He was held assessable to surtax in respect of this dividend under what is now section 412 of the Income Tax Act, 1952. The bonus issue was held to be income "which (if received in the U.K.) would be chargeable to income tax by deduction or otherwise" within the meaning of that section.

McNaughton J., in discussing *Fisher's* case, said: "I think that it is clear that Viscount Cave L.C. did not accept the simple view of *Blott's* case, which commended itself to Lord Sumner and that, in his view, *Blott's* case was applicable because the debenture stock issued to Bishop Fisher was not redeemable in the ordinary course for six years and was not very likely to be redeemed at any time" (*m*). He concluded that the question whether bonus

(*k*) [1926] A.C. 395 at p. 403.
(*l*) [1942] 2 All E.R. 665
(*m*) *Ibid.*, at p. 668.

debentures are capital or income " depends to some extent on the prospect of their redemption " and that debentures redeemable by the company on giving thirty days' notice could not be regarded as capital.

It should be noted that the decision in *Aykroyd's* case is contrary to that in *Whitmore* v. *I. R. C.* (*n*). It is submitted that the *Whitmore* case will no longer be followed, however, because it was decided before the House of Lords' decision in *I. R. C.* v. *Fisher's Executors* (*o*). It was based on a decision of the Court of Appeal, which, though confirmed, was confirmed upon somewhat different reasoning.

The rule in *Aykroyd* v. *I. R. C.* (*p*) is not altogether free from difficulty. The case would seem to suggest that a bonus issue of preference shares or debentures can only be regarded as capital if there is no foreseeable prospect of redemption prior to winding up. In the words of Viscount Cave L.C. in *Fisher's* case, capitalisation must be " bona fide ". It is thought, however, that where a company issues debentures redeemable at its option on thirty days' notice but does not in fact elect to redeem for, say, six years, such an issue will not increase the surtax liability of the shareholders (*q*). It will be appreciated that in such circumstances the shareholder " had no power to call in the stock " and was only entitled to assets " if and when the stock was paid off."

The redemption

It has been suggested that the *Aykroyd* case turned upon the point that the debentures had in effect been redeemed. McNaughton J. said: " The [Canadian companies] in fact distributed the dividend . . . in cash and thereby, according to Lord Sumner, by the process which he describes as alchemy, they turned capital into income."

This dictum must be regarded with some care. It is submitted that where a company redeems preference shares or debentures, say, six years after the date of their issue, the assets released are capital rather than income, according to the test suggested in *Pool* v. *Guardian Investment Trust Co., Ltd.* (*r*). Furthermore, Viscount Cave L.C. spoke of the company " irrevocably " electing to capitalise its profits on the facts of *Fisher's* case.

Where preference shares are redeemed under section 58 of the Companies Act, 1948, this must be done either out of the proceeds

(*n*) (1925) 10 T.C. 645.
(*o*) [1926] A.C. 395.
(*p*) [1942] 2 All E.R. 665.
(*q*) *C.I.T. Bengal* v. *Mercantile Bank of India, Ltd.* [1936] A.C. 478.
(*r*) [1922] 1 K.B. 347.

of a fresh issue of shares or out of profits transferred to a " capital redemption reserve fund ". Profits transferred to such a fund are to be treated as paid up share capital for the purposes of the provisions of the Companies Act relating to the redemption of share capital. Consequently, a distribution of cash on the redemption of preference shares closely resembles a distribution on reduction of capital under section 67, which is generally accepted not to be income for surtax purposes (*s*).

As regards the redemption of debentures, a repayment to a person who had lent money to the company is clearly capital, but it is arguable that a distribution on the redemption of a bonus issue of debentures is income for surtax purposes. *Fisher's* case rules that a company which applies profits in paying up debenture stock impounds them " as income producing capital," but it was suggested in *Aykroyd's* case that redemption " turned capital into income." It is submitted that where a company redeems bonus debentures after making use of the capitalised profits for a considerable period, the distribution remains capital and is not liable to surtax. The company " the master of the situation " had taken positive steps to capitalise its profits as opposed to accumulating them (*t*) and this election was made " irrevocably."

Fictitious transactions

We have seen that bonus issues do not cease to be capital merely because they are redeemable on short notice, if not in fact redeemed for a considerable period; and that once assets have been capitalised, those distributed on redemption of the bonus issues remain capital. Nevertheless, it seems clear that a bonus issue is assessable to surtax if used as a cloak under which to pay a dividend. It was pointed out in *Fisher's* case (*u*) that the company's election to capitalise must be " made in good faith " and Lord Hanworth M.R. indicated in *I. R. C.* v. *Wright* (*v*) that the courts would examine " the substance of the matter."

It is submitted that *I. R. C.* v. *Aykroyd* (*w*) will be followed in so far as it makes assets distributed to shareholders assessable to surtax in cases where a bonus issue is actually redeemed shortly after being declared. The length of the period which must elapse between issue and redemption to avoid this rule must depend to some extent on surrounding circumstances. However, on the

(*s*) *Cf. I.R.C.* v. *Burrell* [1924] 2 K.B. 52 and the non-taxable nature of a distribution by a liquidator.

(*t*) *Cf. C.I.T. Bengal* v. *Mercantile Bank of India, Ltd.* [1936] A.C. 478.

(*u*) [1926] A.C. 395.

(*v*) [1927] 1 K.B. 333.

(*w*) [1942] 2 All E.R. 665.

authority of the *Mercantile Bank of India, Ltd.* case (*x*), it is submitted that a period of two years will normally suffice.

Limitations to Tax Advantages from Capitalisation

Although a bonus issue enjoys considerable surtax advantages over a dividend (in the absence of a surtax direction), other tax benefits derived are strictly limited since the company's profits will have borne income tax at the standard rate prior to capitalisation. Indeed, distribution in the form of a bonus issue will be unfavourable to those shareholders who are not liable to income tax at the standard rate in that their tax repayment claim will be reduced.

Profits tax

Prior to April 1, 1958, a bonus issue of shares or debentures had certain profits tax advantages as relief for non-distribution could be obtained on the ground that the company retained all the assets which it previously enjoyed. This was subject to the power of the Commissioners to make a profits tax direction under section 32 of the Finance Act, 1951, and to the provisions of section 31 of that Act whereby any company was deemed to have made a distribution to its members for profits tax purposes if it capitalised a distributable sum but, whether before or after such capitalisation, applied any sum in reducing its capital (*e.g.*, in redeeming a bonus issue) (*a*).

However, section 25 (1) of the Finance Act, 1958, now enacts:—

"As from the beginning of April, 1958, the profits tax shall be charged on the profits arising in any chargeable accounting period from a trade or business to which section 19 of the Finance Act, 1937, applies at the rate of ten per cent. on the amount of those profits, subject to the provisions for abatement in section 33 of the Finance Act, 1947, *but without any relief for non-distribution* or any distribution charge for chargeable accounting periods ending after the beginning of that month" (subject to the transitional provisions contained in the Seventh Schedule).

In considering the effects of section 25, the dictum of Viscount Simonds in *I. R. C.* v. *Butterley Co., Ltd.* (*b*) should be remembered. He pointed out that: "If the question is whether certain receipts of a company are profits of a trade carried on by it during a certain period, the determining factor is not what use

(*x*) [1936] A.C. 478.

(*a*) It was, however, held in *I.R.C.* v. *Pollock & Peel, Ltd.* [1956] 1 W.L.R. 951 that no distribution within the meaning of section 31 takes place where a bonus issue is followed by liquidation.

(*b*) [1957] A.C. 32, at p. 56.

the company makes of them when received, but what is the source from which they are derived."

Surtax direction

The surtax advantages of a bonus issue are lost if the Special Commissioners make a direction under section 245 of the Income Tax Act, 1952, that the company's income is to be deemed that of its members for surtax purposes. Even a company other than an investment company is liable to a surtax direction, if it has not (within a reasonable time after the end of its accounting period) distributed to its members a reasonable part of its actual income for the said period, in such manner as to render the amount distributed part of their total income for surtax purposes.

By section 246 (2), any sum expended out of the company's income in redemption of any share or loan capital or debt issued or incurred otherwise than for adequate consideration shall be regarded as income available for distribution. It was held in *I. R. C.* v. *Thornton Kelley & Co.* (*c*) that although in law a company receives some benefit from its ordinary shareholders in the issue to them of bonus preference shares, the value of that consideration is substantially less than the amount of capital issued. Consequently, since the bonus was declared "otherwise than for adequate consideration," a surtax direction could properly be made on redemption of the preference shares.

It will be appreciated that a company which distributes its income in the form of bonus shares does not render the amount distributed part of its members' total income for surtax purposes within the meaning of section 245. Therefore, even though such a company may escape a surtax direction on making the issue, it will have difficulty in avoiding a direction on "repayment" of bonus preference shares or debentures. It is, of course, open to the company to submit its accounts, etc., to the Special Commissioners under section 252 and thereby ascertain whether it is their intention to make a surtax direction.

It must be remembered, however, that section 245 only authorises a surtax direction to be made in respect of companies falling within section 256 of the Income Tax Act, 1952, that is to say, in respect of a company which (a) is controlled by not more than five persons (as defined in subsections (2) and (3)), (b) is not a subsidiary of a company outside section 256 within the meaning of subsection (4) and (c) is not a company in which the public are substantially interested within the meaning of subsection (5).

(*c*) [1957] 1 W.L.R. 482.

In the case of companies outside section 256 or able to escape a surtax direction for some other reason, substantial surtax advantages may be derived from making a bonus issue and subsequently winding up the company or from making a redeemable bonus issue and redeeming the same, say, two or three years after the date of issue. It may be noted that the Control of Borrowing Order, 1958 (*d*), no longer compels a company to obtain Capital Issues Committee consent before making an issue of bonus shares. However, consent is still required in the case of a bonus issue of redeemable shares (art. 4 (6)) or of debentures (art. 4 (7)), unless the £50,000 exemption in article 8 applies.

(*d*) S.I. No. 1208.

NOTES OF RECENT CASES

1. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Woodley v. *Tersons, Ltd.* [1958] 1 W.L.R. 1011; [1958] 3 All E.R. 305 (Q.B.D.)

Damages—Fatal Accidents Act, 1846*—payment out to trustees—investment powers.*—This case further illustrates the current need for wide investment clauses. The plaintiff, a widow, asked that damages of £3,700, recovered under the Fatal Accidents Act, 1846, be not administered by the court but be paid out to a bank trustee department on the trusts of a deed giving a much wider power of investment than that enjoyed by the court. Devlin J. approved the arrangement, though reminding the plaintiff that the trustee would not have such free powers of administration as the court.

Green v. *Russell. McCarthy* (*Third Party*) [1958] 3 W.L.R. 371; [1958] 3 All E.R. 44 (Q.B.D.)

Implied trust arising out of contract—insurance policy—damages —Fatal Accidents Acts, 1846–1908.—Damages recovered under the Fatal Accidents Act, 1846, are not to be reduced by reason of any insurance moneys payable on the death of the deceased (Fatal Accidents (Damages) Act, 1908, s. 1). In the present case the defendant employers had taken out a "personal accident group insurance policy" whereby moneys were payable to them on injury to named employees; such moneys were in fact paid over to the employees or their representatives. The question was whether such moneys had to be deducted from damages recovered by the plaintiff under the Fatal Accidents Act, 1846. It was argued that the Act of 1908 only applied where the deceased had a right to claim the moneys, whereby it was necessary to consider whether the insurance contract created a trust in favour of the named employees. Ashworth J. actually decided the case by holding the Act of 1908 wide enough to exclude these moneys in any event, but went on to express his views on the trust point. Here he held that on the facts there was no more than a good intention, if that, to pay anything to employees and no legal or equitable obligation, distinguishing *Bowskill* v. *Dawson* (*No.* 2) [1955] 1 Q.B. 13, where a similar type of life policy was concerned, because there the employees had entered into an express trust deed. The learned judge further declined to consider whether the plaintiffs might also have sued under the Law of Property Act, 1925, s. 56, as interpreted by Denning L.J. (as he then was) in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B.

500 and *Drive Yourself Hire Co. (London), Ltd.* v. *Strutt* [1954] 1 Q.B. 250.

The rule that only the parties to a contract can sue upon it, though firmly established by *Dunlop* v. *Selfridge* [1915] A.C. 847, has been much criticised. An acknowledged exception exists where the circumstances show that the contract creates a trust in favour of a third party, but it is impossible to say with any confidence when the courts will hold that this has happened (see *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70; *Re Schebsman* [1944] Ch. 83; Nathan, *Equity through the Cases*, 3rd ed., pp. 533 *et seq.*). The mere fact that A agrees with B to pay C is not enough to make C a *cestui que trust*, and here not even those facts were established, for the insurance company was bound to pay to the employers. As to the claim under the Law of Property Act, 1925, s. 56, it should be said, with respect, that Denning L.J.'s judgments, above referred to, go much further than the general view, which is that the section helps only those with whom there is intended to be an agreement—see *White* v. *Bijou Mansions, Ltd.* [1936] Ch. 630; [1938] Ch. 351; *Stromdale and Ball* v. *Burden* [1952] Ch. 223.

Re Rider's Will Trusts [1958] 1 W.L.R. 974; [1958] 3 All E.R. 135 (Ch.D.).

Trust—investment clause—construction—Trustee Act, 1925, *ss.* 1, 69.—The full range of trustee investments authorised by statute is available to trustees unless a contrary intention is expressed in the trust instrument (Trustee Act, 1925, ss. 1 (1), 69 (2)). "Contrary intention" means the same as "expressly forbidden," which were the corresponding words in the Trustee Act, 1893, s. 1 (*Re Warren* [1939] Ch. 684). Harman J. here had to construe a clause authorising various investments, including securities of "any British Colony or Dependency" and concluding with the words ". . . or upon real securities in England but not otherwise." The trustees asked if they could lawfully invest in government stocks and securities of Australia, New Zealand and Southern Rhodesia, and in Essex County 5 per cent. Redeemable Stock 1968/71. The learned judge held that the words "but not otherwise" (1) grammatically applied to the whole clause and not merely to real securities and (2) forbade investments not of the mode or classes already mentioned but otherwise left the trustees free to make any trustee investment, following *Re Westby* [1932] I.R. 444 and distinguishing *Re Hill* [1914] W.N. 132 where the words were "on no other investment whatsoever" (see, too, *Ovey* v. *Ovey* [1900] 2 Ch. 524, where the phrase "and no other securities" limited the trustees to those named in the instrument). Consequently the Dominion and Rhodesian stocks were authorised but not the Essex County stock.

Harman J. went on to express the view (*obiter* by his own statement) that the words "any British Colony or Dependency" in an instrument made before the Statute of Westminster, 1931 (the relevant date here was 1908), would authorise investment in stocks of the self-governing Dominions. He considered the contrary view expressed by

Danckwerts J. in the *Brassey's Settlement* [1955] 1 W.L.R. 592; [1955] 1 All E.R. 577 depended on the fact that the settlement there was made in 1936.

Though it is generally said that investment clauses are to be construed strictly, the construction here adopted will be welcome in a time when the widest investment clauses are popular. The facts also underline the dangers of using out-of-date or imprecise words.

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2. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Cole [1958] 3 W.L.R. 447 (C.A.); [1958] 3 All E.R. 102

Amenities not strictly charitable—institution maintained by local authority for various classes of juveniles.—The testator made a bequest of income for the general benefit and welfare of the inmates of an institution. The institution was maintained by the local authority and its inmates included various types, such as orphans and neglected children, deserving special help, and youths with criminal sentences or beyond parental control. The majority of the court decided that, even assuming the institution was charitable, the terms of the bequest would permit the whole of it to be devoted to objects which, though beneficial, were not charitable, such as special equipment for amusement and pleasure of the inmates. The extreme example of a television receiver for juvenile delinquents was suggested. Hence the gift failed for perpetuity. Lord Evershed M.R. in his dissenting judgment would have construed the bequest as tacitly restricted to the sort of welfare which it was the statutory duty of the local authority to provide. Here the analogy of gifts for "parish work" would suggest some doubt as to such a construction being possible, and it is common experience that private gifts tend to be aimed at supplementing State welfare service. Otherwise the gift would be to the local authority or the national Exchequer, or to the ratepayers and taxpayers. A possible solution would be to construe the gifts as made to the same objects but allowing a fuller attainment of those objects, since public moneys are limited.

The other point was whether such an institution for young persons or children was in itself a charitable institution. Romer and Ormerod L.JJ. did not have to deal with this point, on the view which they had taken. Lord Evershed considered that the various functions performed by the institution were all closely analogous to recognised charitable objects, and fell within the "spirit and intendment" of the Act of Elizabeth I. The preamble to that Act refers to training of orphans, upkeep of prisons and care of the helpless, and the judgment of the Master of the Rolls points clearly to the analogies presented by approved schools and similar institutions to these objects.

(Theobald 347)

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Cole [1958] 3 W.L.R. 447 (C.A.); [1958] 3 All E.R. 102

Property bearing its own charges—no contrary intention—joint charge on several properties—different dispositions of properties—Administration of Estates Act, 1925, *s.* 35.—The Court of Appeal left the point open, but Lord Evershed M.R. discussed it without deciding it, whether *Re Biss* [1956] Ch. 243 was wrongly decided. Where property is subject to a charge it must itself bear that charge and is not entitled to exoneration out of residue. If several properties are charged the charge is borne proportionately *ad valorem* by each. These rules may be excluded by the expression of a contrary intention in the will. According to the older cases (on statutes re-enacted in the A. E. Act, s. 35) the proportionate liability is not excluded because the testator has made a specific devise of one of them but not the other. This is a matter of construction, and not based on any technical approach to devises. *Re Biss* is doubted in the books and the Master of the Rolls shares this doubt. In the instant case three properties had been mortgaged to a bank by a deposit by the testator of the title deeds of the three properties with the bankers. The testator then specifically devised two of the properties to certain objects, and the third fell under a residuary devise to another devisee. It appears that each property is liable proportionately to its value for the amount charged. A specific devise enjoys some advantages over residuary devises today but they are in no way concerned with the exoneration of charges.

(Williams on *Executors,* Vol. 2, p. 973.)

In the Estate of Skinner [1958] 1 W.L.R. 1043; [1958] 3 All E.R. 273

Office of personal representative unassignable—effect of amalgamation of trustee corporation on executorship.—An executorship is very personal and unassignable. Furthermore, the statutory provisions permitting trustees to retire in favour of successors appointed by themselves do not appear to apply to personal representatives, possibly because of their special relation to the Probate Court, though personal representatives can generally take advantage of provisions in the 1925 legislation relating to trustees.

In the instant case the G. Bank was executor under S.'s will. The will being disputed the G. Bank was appointed administrator *pendente lite.* In July, 1957, the G. Bank was amalgamated with the N. Bank and its assets transferred to the N. Bank, but the G. Bank remained undissolved. The scheme, under section 206 of the Companies Act, 1948, excluded any existing rights or liabilities as personal representatives, but forbade the G. Bank taking out any further grants of representation. As the pending proceedings might terminate in a grant of probate to the G. Bank, in place of their temporary

grant of administration, the G. Bank took out a summons for directions as to whether they should continue as parties. Sachs J. held that the 1957 scheme was ineffective so far as it prevented the G. Bank acting as executor—the G. Bank had meddled and could no longer renounce the office. A vesting order of the court in November, 1957, which provided that all pending actions by or against the G. Bank should be continued by or against the N. Bank was equally ineffective (*Nokes* v. *Doncaster, etc.* [1940] A.C. 1014 was referred to). The probate proceedings would therefore continue in the name of the G. Bank, and the N. Bank was out of the picture.

There was a curious tailpiece to this case. All the assets of the G. Bank had been assigned to the N. Bank. It was therefore argued that the G. Bank were no longer a trust corporation and could not take a grant in that character. The learned judge pointed to the words of the Public Trustee Rules, 1912, r. 30, which refer to the amount of issued share capital of the company and not to the beneficial ownership of its shares. The G. Bank therefore remained a trust corporation. This seems a convenient and proper conclusion—many trust corporations are owned by shareholders, and these might decide on voluntary liquidation at some time.

(Williams on *Executors,* Vol. 1, p. 24.)

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4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Baker v. *Sims* [1958] 3 W.L.R. 546; [1958] 3 All E.R. 326 (C.A.).

Leasehold Property (Repairs) Act, 1938—*service of counter-notice claiming benefit of Act—action for damages less than five years before expiration of term—whether action maintainable without leave.*—The decision in this case turned upon the true construction of section 1 (3) of the Leasehold Property (Repairs) Act, 1938. Subsections (1) and (2) of section 1, it will be remembered, originally gave to tenants of certain small dwelling-houses, who held their houses for terms of twenty-one years or more, of which at least five years remained unexpired, and who were sued by their landlords for breaches of repairing covenants contained in their leases, the right to serve a counter-notice claiming the benefit of the Act; and subsection (3) provided (and still provides) that where such a counter-notice is served by a tenant, then, "notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor . . . otherwise than with the leave of the court." The question was whether, when once a counter-notice has been served, section 1 (3) amounts to an absolute bar against the taking of any proceedings at any time without the leave of the court: or whether it only applies to action brought at a time when the number of years of the tenant's term specified in subsections (1) and (2) of that section (originally five years) have still to run.

The Court of Appeal unanimously adopted the latter alternative. Subsection (3) of section 1 must, in their view, be read in the light of section 1 as a whole and in particular of subsections (1) and (2) of that section, which only impose a restriction on the landlord's rights in cases where a defined portion of the tenant's term remains unexpired. "No proceedings shall be taken" in subsection (3) must, therefore, be read as "no such proceedings shall be taken," *i.e.*, the proceedings contemplated by subsections (1) and (2) shall not be taken, without the leave of the court. The present action, which was brought without leave less than five years before the term granted by the lease would have expired, had it not already been surrendered by an assignee of the defendant, was, therefore, maintainable.

It will also be remembered, of course, that the scope of the Act of 1938 was extended by section 51 of the Landlord and Tenant Act, 1954, so that it now applies to any tenancy of any property other than an agricultural holding for a term of not less than seven years, of which three years or more remain unexpired. But the Act of 1954 did not apply to this particular case, since the landlord's notice of dilapidations was served before that Act came into force (see s. 51 (5)).

Teasdale v. *Walker* [1958] 1 W.L.R. 1076; [1958] 3 All E.R. 307 (C.A.).

Landlord and Tenant Act, 1954—*business premises—occupied by tenant for purposes of his business—"mock auction" room used in summer season only—business conducted by "manager" under sham agreement—keys returned by "manager" at end of season—whether tenancy within the Act.*—The question which fell to be decided in this case was whether the property comprised in the tenancy was "occupied by the tenant" and "so occupied for the purposes of a business carried on by" the tenant within the meaning of section 23 (1) of the Landlord and Tenant Act, 1954.

The premises consisted of a lock-up shop and cellar at Skegness, which were let to the tenant for one year from March 2, 1955, and which were used for "mock auctions" at Easter, Whitsun and from July to September in each year. In 1955 and 1956 the tenant carried on business there herself through her servants, retaining the profits: but in April, 1957, she entered into an agreement whereby she purported to employ a "manager" of the shop for one year upon the terms that the "manager" paid the tenant £750 on the signing of the agreement, but that he should have full liberty to conduct the business of the tenant as he thought fit without any interference on the part of the tenant, keeping all the profits and defraying all outgoings and expenses including rent and rates. The "manager" carried on the business on these terms during the summer of 1957, and at the end of the season he locked up the premises, returning the keys. Meanwhile in August, 1957, the landlord served a notice under section 25 of the Act of 1954 to terminate the tenancy on March 2, 1958; and the tenant filed an application for a new tenancy on December 17, 1957, the application coming on for hearing in the county court on February 21, 1958.

Upon these facts the Court of Appeal held unanimously that the tenant was not entitled to a new tenancy, since, whether the relevant date was the date of the tenant's application, the date of the hearing or the date upon which the landlord's notice expired, the tenant was not herself occupying the premises within the meaning of the Act on any of those dates. Nor, even if she was so occupying them, could she be said to be doing so for the purposes of a business. The agreement with the so-called " manager " was, in the opinion of the court, a sham agreement designed to keep the original tenancy within the protection of the Act and to circumvent a clause in the tenancy agreement whereby the tenant agreed not to assign, underlet or part with the possession of the premises or any part thereof. While the " manager " was occupying the premises, therefore, these premises were not premises to which Part II of the Act applied: and the tenant had done nothing, after receiving back the keys, to indicate clearly that she was again occupying them for the purposes of a business of her own.

The question of purely seasonal occupation of business premises was also raised. Upon this point the court expressed the view that it is " a question of fact and degree whether premises that, for instance, are used only for summer purposes can be said to be so occupied during the winter months." In the present case the tenant would, in their view, have been in occupation at the material times, if she had herself been in occupation during the summer of 1957.

It was also pointed out that the tenancy might, at any time during the " manager's " occupation, have been terminated by notice to quit under section 24 (3). But the notice which was in fact served was served under section 25 (1) (not under section 24 (3)), so that it remained open to the tenant to prove, if she could, that her tenancy had been brought back within the protection of the Act.

PRECEDENTS

FORM 1

Precedents for Sale of a Mortgage Debt and Transfer of Mortgage by two deeds, the amount paid for the Mortgage Debt being kept off the title (*a*)

(*Drafted by Frederick Wm. Kay, Esq., Solicitor, Rochdale*)

A—Assignment of Mortgage Debt

THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "the Vendor") of the one part and CD of *etc.* (hereinafter called "the Purchaser") of the other part

WHEREAS:—

(1) By a Legal Charge (hereinafter called "the Mortgage") dated the —— day of —— 19— and made between EF of the one part and the Vendor of the other part the said EF charged by way of Legal Mortgage the [leasehold] messuage or dwelling-house No. — with the payment to the Vendor of the sum of £—— and interest at the rate of £—— per cent. per annum as therein mentioned

(*a*) Due to the high Bank Rate and the difficulty of finding new mortgages, in the event of the mortgagee of property desiring repayment he sometimes has to accept from a transferee less than the mortgage debt. This is especially so if the mortgage is for a fixed term at a comparatively low rate of interest.

In some cases the transferee, for reasons of his own, does not wish the borrower to know the actual sum paid to purchase the mortgage and in those cases the present forms may be used. The only disadvantage is that stamp duty must be adjudicated because of the recital as to ownership in equity which appears in the transfer of mortgage. Upon a recent adjudication in respect of a transaction carried out by the present forms the adjudication department charged *ad valorem* "conveyance on sale" duty on the consideration on the Assignment and *ad valorem* "transfer of mortgage" duty on the sum outstanding on the mortgage on the Transfer of Mortgage.

(2) There is owing to the Vendor by the said EF on the security of the Mortgage the principal sum of £—— together with £—— for arrears of interest

(3) The Vendor has agreed with the Purchaser for the sale to him of all moneys owing to the Vendor by the said EF and the benefit of the security created by the Mortgage for the sum of £—— subject to the right of redemption (if any) still subsisting in respect of the Mortgage

NOW THIS DEED WITNESSETH as follows:—

1. IN consideration of the sum of £—— now paid by the Purchaser to the Vendor (the receipt of which sum the Vendor hereby acknowledges) the Vendor AS BENEFICIAL OWNER hereby ASSIGNS unto the Purchaser the full benefit of all moneys owing to the Vendor by the said EF for principal and interest with full power and authority for the Purchaser at his own expense to sue for and take all necessary steps and proceedings to recover the moneys hereby assigned

2. THE Vendor will at the request and cost of the Purchaser execute a Transfer of the benefit of the Mortgage to the Purchaser by separate Deed

[3. IT IS HEREBY CERTIFIED that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £——]

IN WITNESS, *etc.*

B—Transfer of Mortgage (Legal Estate)

THIS TRANSFER OF MORTGAGE is made the —— day of —— 19— BETWEEN AB of etc. (hereinafter called "the Transferor") of the one part and CD of etc. (hereinafter called "the Transferee") of the other part

WHEREAS:—

(1) This deed is supplemental to the within written Legal Charge

(2) There is still owing to the Transferor on the security of the within written Legal Charge the sum of £—— being £—— representing the balance now owing in respect of the said

principal moneys secured by the Mortgage and the sum of £—— being arrears of Interest

(3) The benefit of the within written Legal Charge and of the said sum of £—— owing to the Transferor in respect of the said principal moneys thereby secured and the arrears of interest thereon now belongs in equity to the Transferee who has requested the Transferor to transfer to him the benefit of such Mortgage which the Transferor has agreed to do in manner hereinafter appearing

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the premises the Transferor AS MORTGAGEE hereby transfers unto the Transferee ALL the benefit of the within written Legal Charge and all principal moneys and interest due thereunder

IN WITNESS, *etc.*

FORM 2

Lease of premises decontrolled by the Rent Act, 1957, to the same Tenant, determinable on the Tenant's death or upon her ceasing to reside in the premises (*a*)

THIS LEASE is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called " the Landlord " which expression shall where the context so admits include the estate owner or estate owners for the time being of the reversion of the premises hereby demised expectant upon the term hereby granted) of the first part CD of *etc.* (hereinafter called " Mr. CD ") of the second

(*a*) A number of points must be considered in drafting such a lease. In the first place, in order to escape the meshes of control, it must not be determinable *by the landlord* within a period of three years. Secondly, express provisions must be inserted to prevent the application of s. 149 (6) of the Law of Property Act, 1925. Thirdly, it seems desirable, in the case of an elderly tenant, to provide for a third party of substance to act as the tenant's attorney for surrendering the lease in the event of the tenant giving up residence. Lastly, care must be taken to secure that the provisions for bringing the lease to an end are not void for uncertainty.

part and EF of *etc.* (hereinafter called "the Tenant") of the third part

WHEREAS:—

(1) By an Agreement dated the —— day of —— 19— and made between GH of the one part and IJ of the other part the messuage or dwelling-house and premises situate and being known as —— (hereinafter called "the property") was let to the said IJ for a term of —— years from the —— day of —— 19—

(2) The said IJ remained in possession of the property upon the terms of the said Agreement until her death on the —— day of —— 19—

(3) For a period of upwards of six months prior to the said —— day of —— 19— (*b*) the Tenant had been residing in the property with the said IJ (who was the Tenant's [sister]) and after the death of the said IJ the Tenant remained and has ever since continued in possession of the property upon the terms of the said Agreement

(4) The rateable value of the property for the purposes of the Rent Act, 1957 is £—— and accordingly the Landlord (who is the owner of the property in fee simple) is entitled to serve a notice to quit on the Tenant expiring on or after the 6th day of October 1958 and to recover possession of the property upon the expiry of such notice.

(5) The Landlord has agreed with Mr. CD and the Tenant to grant to the Tenant such a tenancy as is hereinafter granted upon the terms and subject to the covenants and conditions hereinafter contained.

Now in pursuance of the said Agreement and in consideration of the surrender by the Tenant of all her right title and interest (if any) as a controlled or statutory tenant in the property and of the rent covenants and provisions hereinafter reserved and contained THIS DEED WITNESSETH as follows:—

1. The Landlord hereby demises unto the Tenant ALL that the property TO HOLD the same unto the Tenant for the term of [20] years from the —— day of —— 19— determinable as hereinafter mentioned PAYING THEREFOR yearly during the said term the rent

(*b*) This date will be that mentioned in recital (2).

of £—— to be paid without any deduction except for landlord's property tax by equal quarterly payments on the usual quarter days in every year the first of such payments to be made on the —— day of —— next

2. The tenancy hereby created shall after (but not before) the expiration of three years from the date hereof (*c*) be determinable by the Landlord by one month's notice in writing given to determine the same at any time after the happening of either or both of the following events namely: —

(1) the death of the Tenant

(2) if the Tenant shall not have physically resided in the property for a continuous period of [four] weeks next before the service of such notice

and upon the expiry of any such notice the term hereby created shall forthwith cease and determine but without prejudice to the accrued rights (if any) of the Landlord or the Tenant under the provisions hereof

3. The Tenant hereby irrevocably appoints Mr. CD to be her attorney for her and in her name and on her behalf and as her act and deed or otherwise to sign seal and deliver or otherwise perfect a surrender to the Landlord of the residue of the term hereby granted for all the purposes of this deed

4. The Tenant and Mr. CD hereby jointly and severally covenant with the Landlord that without prejudice to any of the other provisions hereof Mr. CD will in the exercise of the power of attorney hereby conferred upon him and of every or any other power for the time being vested in him in that behalf surrender to the Landlord the residue of the term hereby granted in and immediately upon the happening of the following event namely: —if the Tenant shall cease to be in physical residence in the property for a continuous period of [four] weeks

5. The Tenant hereby covenants with the Landlord that without prejudice to any of the other provisions hereof the tenant's personal representatives will in the event of the tenant's death during the continuance of the term hereby created and as soon

(*c*) If the term is to commence *after* the date of execution, the date of such commencement should be inserted in lieu of the words "date hereof."

as practicable thereafter surrender the residue of the said term to the Landlord.

[6. The Tenant hereby further covenants with the Landlord as follows:—

(1) Not to assign sublet or part with or share the possession of the property or any part thereof or hold the same or any part thereof in trust or as agent or otherwise for the benefit of any other person

(2) To permit the Landlord his agent servants or workmen to enter upon the property for the purpose of carrying out the works of repair and redecoration and otherwise to the property particulars whereof are set forth in the Schedule hereto]

6. Save in so far as the same are inconsistent with or are modified by the provisions of this deed the provisions of the said recited Agreement shall be deemed to be incorporated herein and shall have effect accordingly.

IN WITNESS, *etc.*

THE SCHEDULE *before referred to*

FORM 3

Agreement for marketing Products to be manufactured from a newly invented machine

(Drafted by J. M. Bryan, Esq., of the Inner Temple, Barrister-at-Law)

THIS DEED is made the —— day of —— 19— BETWEEN AB of —— in the County of —— (hereinafter called "the Inventor") of the first part THE CD COMPANY LIMITED whose registered office is situate at —— in the County of —— (hereinafter called "the Manufacturing Company") of the second part and THE EF COMPANY LIMITED whose registered office is situate at —— in the County of —— (hereinafter called "the Licensees") of the third part

WHEREAS:—

(1) The Inventor and the Manufacturing Company have jointly filed an Application for Letters Patent to be granted to the Manufacturing Company in respect of an invention for Improvements in the manufacture of —— (hereinafter referred to as "the Protected Products") on the —— day of —— 19— the said Application having been numbered ——

(2) By an Agreement dated the —— day of —— 19— and made between the Inventor of the one part and the Manufacturing Company of the other part the Inventor agreed to assign to the Manufacturing Company his interest in the said invention and in the said Application and in any Letters Patent to be granted pursuant thereto and there was also filed with the said Application a declaration by the Inventor of his assent to the making of the said Application pursuant to the provisions of subsection (2) of section 2 of the Patents Act 1949

(3) The Manufacturing Company have agreed to grant to the Licensees an exclusive licence to vend and sell in accordance with the said invention the Protected Products upon the terms hereinafter appearing

NOW IT IS HEREBY AGREED BY AND BETWEEN the parties hereto as follows

1. THIS AGREEMENT shall remain in force for the maximum continuous period of 21 years calculated from the date of the execution of these presents determinable nevertheless as hereinafter provided

2. THE Manufacturing Company shall forthwith upon the granting of Letters Patent pursuant to the said Application grant and the Licensees shall take a Licence to vend and sell in accordance with the said invention the Protected Products the subject of the said Letters Patent within the United Kingdom of Great Britain and Northern Ireland and the Isle of Man for the full term (*a*) of the said Letters Patent and any extension thereof but so that the duration of the said full term together with all (if any) extensions or extension thereof shall not exceed or extend beyond the said maximum expiry date of this Agreement calculated in accordance with the provisions of Clause 1 hereof

3. THE licence referred to in the last preceding clause shall be in accordance with the form of licence set forth in the Schedule hereto and shall be subject to the provisions of this Deed and until such licence shall be granted this Deed shall take effect as a licence

4. THE Licensees shall have the exclusive right during the continuance of this Deed and of the Licence to be granted pursuant thereto to vend and sell the Protected Products

5. THE Licensees shall have the right to grant sub-licences and to export the Protected Products

6. THE Licensees shall in every year during the continuance of this Deed and of any Licence to be granted pursuant thereto pay to the Manufacturing Company by way of royalty on the net selling price of all Protected Products so sold by the Licensees the sums to be calculated on the scale following that is to say

(*a*) The full term of a patent is at present 16 years from the date thereof under subsection (2) of section 22 of the Patents Act, 1949. Extensions may be further claimed on the ground of inadequate remuneration up to a maximum of 10 years, under the provisions of subs. (1) of s. 23 of this Act.

(1) For all such Protected Products realising up to and not exceeding in the whole the total net selling price of £—— at the rate of [£10] per cent. on such net total price realised as aforesaid

(2) Subject as aforesaid for all such Protected Products realising in excess of the total net selling price of £—— and not exceeding in the whole the total net selling price of £—— at the rate of [£7 10s.] per cent. on such total net selling price realised as last aforesaid

(3) Subject as aforesaid for all Protected Products realising or exceeding in the whole the total net selling price of £—— at the rate of [£5] per cent. on such total net selling price realised as last aforesaid

7. THE Licensees shall keep true and particular accounts of all Protected Products sold by them and of all royalties payable by them in accordance with the provisions of Clause 6 hereof and shall within twenty-eight days after the —— day of —— the —— day of —— the —— day of —— and the —— day of —— in each year during which this Deed and the licence pursuant thereto shall continue in force deliver to the Manufacturing Company a true account of all such Protected Products sold and all royalties due hereunder in respect of the preceding three months up to the last preceding day of account and shall at the same time pay to the Manufacturing Company the amount of the royalties shown to be due PROVIDED that if this Deed or the Licence pursuant hereto shall terminate on a day other than one of the said days of account the last account and payment shall be rendered and made within twenty-eight days of the termination of this Deed and of the said Licence and shall be in respect of the period from the last day to which an account was due to be rendered until the day of such actual termination

8. THE Licensees shall permit the Manufacturing Company's Accountant or other duly authorised representative or representatives of the Company once in every three months on notice duly given at reasonable times in the day time to inspect verify and take copies of and extracts from the accounts to be kept by the

Licensees under the last preceding clause hereof and shall on demand produce to the Manufacturing Company's said Accountant or other duly authorised representative or representatives as aforesaid any receipts or vouchers relating thereto

9. THE Manufacturing Company shall pay all fees necessary during the continuance of this Deed or the Licence to be granted pursuant hereto for the renewal of the said Letters Patent at least 14 days before the same become due and shall if requested so to do produce to the Licensees the receipts for payment of such fees PROVIDED that if the Manufacturing Company shall make default in paying any such renewal fee the Licensees may pay the said fee and deduct the amount of such payment from the royalties payable by them hereunder

10. IF Letters Patent are not granted pursuant to the said Application or are only granted in such form that they do not protect the said invention or if such Letters Patent (when granted) shall be revoked or declared invalid or if the claims thereof which effectively cover the said invention shall be declared invalid by a Court of competent jurisdiction this Deed and all provisions thereof and the Licence granted pursuant thereto shall wholly cease determine and be made void as from the date of decision of such Court but without prejudice to the accrued rights of the parties hereunder.

11. THIS Deed and the Licence to be granted pursuant hereto shall include any improvement in or addition to the invention set forth in the said Application or the Letters Patent granted pursuant thereto. By improvement or addition is meant such invention as could either be or have been combined with the said Application to form the subject of one grant of Letters Patent or which could form the subject of a patent in addition to the Letters Patent to be granted upon the said Application and which may be or become the property of or under the control of the Manufacturing Company during the continuance of this Deed or of the Licence granted pursuant hereto. The Manufacturing Company shall take all steps which may be within their power and execute and do all such documents acts and things which may be necessary to grant the same rights to the Licensees in

respect of any such improvement or addition as are herein granted in relation to the said Application and the Letters Patent to be granted pursuant thereto. The Licensees shall in respect of the vending and selling of any such improvement or addition pay royalties in accordance with Clause 6 hereof but no increased royalty shall be payable in respect thereof

12. THE Licensees shall not be under any obligation to institute or defend any legal proceedings in respect of the said Letters Patent or any infringement thereof

13. THE Manufacturing Company shall have the right to determine this Deed and the licence to be granted pursuant thereto by twenty-eight days' previous notice in writing to the Licensees upon the happening of any one or more of the following events

(1) If any royalty payable hereunder shall be in arrear for more than twenty-eight days whether lawfully demanded or not or

(2) If the Licensees shall have a receiver appointed of the whole or any part of their assets or if an order shall be made or a resolution passed for winding up the Licensees unless such order or resolution is part of a scheme of reconstruction of the Licensees or

(3) If the royalties payable by the Licensees to the Manufacturing Company shall be less than the sum of £—— aggregated over a period of one year calculated as expiring upon any of the said four calendar dates appointed for the payment of such royalties as are hereinbefore respectively mentioned

14. ANY dispute question or difference arising under this Deed or the Licence to be granted pursuant hereto as to the rights or duties of any of the parties or the construction or effect of any of the provisions of this Deed or the Licence to be granted pursuant hereto shall be referred to an arbitrator to be agreed between the parties hereto and in default of agreement to be nominated by —— and such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1950 or any re-enactment or modification thereof for the time being in force

In witness whereof the Manufacturing Company and the Licensees have respectively caused their common seals to be affixed and the Inventor has hereunto affixed his hand and seal the day and year first above written

The Schedule above referred to

This Deed made the —— day of —— 19— between The CD Company Limited whose registered office is situate at —— in the County of —— (hereinafter called "the Manufacturing Company") of the one part and The EF Company Limited whose registered office is situate at —— in the County of —— (hereinafter called "the Licensees") of the other part

Witnesseth that the Manufacturing Company doth hereby grant unto the Licensees a Licence to vend and sell certain products according to Letters Patent No. — upon the terms and conditions contained in an Agreement dated the —— day of —— 19— and made between AB of the first part the Manufacturing Company of the second part and the Licensees of the third part (being the within-written Deed)

In witness whereof the Manufacturing Company and the Licensees have respectively caused their common seals to be hereunto affixed the day and year first above written.

FORM 4

Agreement between estate owners holding land (at present let) on trust for sale not to sell except with vacant possession (*a*)

(Drafted by J. M. Bryan, Esq., of the Inner Temple, Barrister-at-Law)

THIS AGREEMENT is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "AB") of the one part and CD of *etc.* (hereinafter called "CD") of the other part

WHEREAS:—

(1) Under or by virtue of the two several Assents more particularly specified in the First Schedule hereto AB and CD are the estate owners in respect of the legal fee simple in each of the respective freehold properties more particularly specified in the Second Schedule hereto (hereinafter collectively called "the Trust Properties") and hold the same as joint tenants upon trust for sale

(2) By virtue of the joint effect of the respective Wills of their father deceased and of their mother deceased AB and CD are together absolutely and beneficially entitled in equity to the Trust Properties as tenants in common in equal shares

(3) Certain of the Trust Properties are now subject to the tenancies or other incumbrances more particularly specified against such Properties in the Third Schedule hereto

(4) AB and CD as such respective co-owners in equity as aforesaid are desirous of executing and carrying into effect the trust for sale affecting the Trust Properties and each and every one of them as aforesaid only as and when each one of the Trust Properties may respectively be sold with vacant possession

(5) In pursuance of such desire as aforesaid AB and CD have instructed Messrs. EF who carry on business at —— in the

(*a*) Stamp 10s. As to the effectiveness of such an agreement in the case of a statutory trust for sale, see *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738. It appears that s. 106 of the Settled Land Act, 1925, does not apply to the powers of Trustees for sale: *cf.* s. 26 (1) and (3) of the Law of Property Act, 1925.

County of —— a firm of Chartered Auctioneers (hereinafter called "the Agents") to find a purchaser or purchasers for such one or more of the Trust Properties as it may from time to time hereafter be practicable to sell with vacant possession and in the meantime to manage the Trust Properties or such one or more of them as may for the time being remain unsold

NOW THIS AGREEMENT WITNESSETH and it is hereby Agreed and Declared as follows

1. IN THIS Agreement the expression "the Trustees" means and includes AB and CD and the survivor of them or other the trustees or trustee for the time being of the Trust Properties

2. EACH of the parties hereto in consideration of the covenants and provisions hereinafter contained doth hereby for himself his executors administrators and assigns MUTUALLY COVENANT with the other of them as follows that is to say

(1) This Agreement shall remain in force for a continuous period of twenty-one years from the date hereof

(2) The Trust for Sale affecting the Trust Properties shall not be executed and carried into effect in regard to the whole or any part of the Trust Properties unless and until the Trustees shall obtain vacant possession thereof or of some part thereof and shall then only be executed in regard to such part or parts of the Trust Properties whereof the Trustees shall from time to time have obtained vacant possession

(3) The Trustees shall hold the net moneys to arise from any such sale or sales as aforesaid Upon Trust for AB and CD as tenants in common in equal shares

(4) Pending the sale of the entirety of the Trust Properties the Trustees shall stand possessed of the rents and profits of the same or of the unsold portions for the time being thereof (after providing for the payment thereout of all rates taxes and other outgoings properly chargeable thereon and affecting the same including the fees and charges of the Agents for managing the same as aforesaid) Upon Trust to pay and divide the same to and equally between AB and CD as tenants in common in equal shares

(5) If and so soon as the Trustees shall obtain vacant possession of the Trust Properties or any part thereof and the Agents shall find a purchaser able and willing to purchase the same with vacant possession at a price to be certified by the Agents as being fair and reasonable the Trustees shall forthwith take all necessary and proper steps to enter into a proper contract for the sale of that property at a price not less than the price so certified as aforesaid and to complete such contract accordingly

IN WITNESS, *etc.*

The First Schedule above referred to

[Particulars of above-recited Assents.]

The Second Schedule above referred to

[Particulars of the Trust Properties.]

The Third Schedule above referred to

[Particulars of the various Tenancies.]

FORM 5

Clause to avoid payment of estate duty on the death of a Beneficiary under a Will within a short time of the Testator's death (*a*)

I DEVISE [BEQUEATH] Blackacre [my shares in the AB Company] to X absolutely if he [she] shall be living at the expiration of [one month] from the date of my death but if X shall predecease me or shall not be living at the expiration of the said period then I Devise [Bequeath] the said property to Y absolutely And I Declare that if and so long as neither X nor Y shall be absolutely and indefeasibly entitled to a vested interest in the said property under the provisions hereof and any of such provisions shall be capable of taking effect the income (if any) derived from the said property shall be accumulated and be held as an accretion to the capital of the said property and be treated for all purposes as one fund with the said property [and if and so far as may be necessary to give effect to the foregoing provisions hereof such income shall be held upon trust to apply or invest the same in the purchase of freehold land] (*b*)

(*a*) Since the war and the advent of high rates of death duties it has been common practice to guard against the death duty consequences of a beneficiary under a will dying (or being deemed to have died) shortly after the testator by making gifts contingent on the beneficiary surviving the testator for a specified period. It would seem, however, that unless express provision is inserted to modify the effect of s. 31 (1) (ii) of the Trustee Act, 1925, there could, in many cases, still be a claim for duty, since under that provision the intermediate income of the property would be payable to an adult beneficiary even though his interest were contingent, and accordingly in the event of his death before attaining a vested interest something might be deemed to pass: *cf. Re Jones' Will Trusts* [1947] Ch. 48. The present clause should avoid any such question.

(*b*) These words will be required only where the gift is of realty or chattels real.

FORM 6

Deed of Compromise made between a Trustee in Bankruptcy and a Creditor compromising claims each has against the other in the estate of the Bankrupt

(*Drafted by P. Elman, Esq., of the Middle Temple*)

THIS DEED OF COMPROMISE is made the —— day of —— 19— BETWEEN —— of —— trustee of the estate of —— a bankrupt (hereinafter called "the Trustee") of the one part and —— of —— (hereinafter called "the Creditor") of the other part

WHEREAS:—

(a) [*recite facts out of which mutual claims have arisen*]

(b) On or about the —— day of —— 19— the Bankrupt was on a petition of the Creditor [*or as the case may be*] adjudicated Bankrupt in the —— County Court and the Trustee was duly appointed trustee of the estate of the Bankrupt with a Committee of Inspection by a resolution of the creditors of the Bankrupt at a meeting of creditors held on the —— day of —— 19— and such appointment was duly certified by the Board of Trade on the —— day of —— 19—

(c) Disputes have arisen between the Trustee and the Creditor regarding their respective rights and liabilities in the bankruptcy of the Bankrupt and his estate and in particular regarding [*recite the particular points of dispute*]

(d) The Trustee and the Creditor are desirous of compromising and settling the said disputes upon the terms hereinafter contained to the intent that neither of them shall have any claim whatsoever against the other of them howsoever arising out of or regarding the bankruptcy of the Bankrupt or his estate

(e) The said Committee of Inspection by a resolution dated the —— day of —— 19— duly gave its consent to and approval of such compromise and settlement upon the terms aforesaid

Now in pursuance of the said desire and in consideration of the mutual covenants and agreements hereinafter contained THIS DEED WITNESSETH as follows:—

1. The Trustee as trustee of the estate of the Bankrupt with the consent and approval of the said Committee of Inspection hereby disclaims all rights and claims whatsoever and howsoever which he can shall or may have for upon or by reason of any matter cause or thing in respect of [*set out the particular points of dispute*] or any of them and hereby releases and forever discharges the Creditor and his estate from all demands actions or proceedings whatsoever in respect thereof

2. The Creditor hereby disclaims all rights and claims that he can shall or may have to or against the estate of the Bankrupt for upon or by reason of any matter cause or thing whatsoever in respect of the matters aforesaid or any of them and hereby releases and forever discharges the Trustee the Bankrupt and the estate of the Bankrupt from all demands actions or proceedings whatsoever in respect thereof

3. The disclaimer and release and discharge hereinbefore contained shall not be deemed to affect and shall not in any way affect the claims rights and remedies of either of the parties hereto against third parties in respect of the said matters or any of them and all such claims rights and remedies are hereby expressly reserved

4. All the costs charges and expenses of and incidental to this Deed of Compromise and the negotiations preliminary thereto shall be borne and paid by the Creditor

IN WITNESS, *etc.*

FORM 7

Deed of Covenant between two persons to create a private company with provisions for finding the capital and generally regulating their rights

(Drafted by C. R. D. Richmount, Esq., of Lincoln's Inn)

This DEED OF COVENANT is made the —— day of —— 19— BETWEEN A of —— in the County of —— of the one part and B of —— in the County of —— of the other part

WHEREAS:—

(1) A Company (hereinafter called "the Company") is about to be incorporated as a private company limited by shares under the provisions of the Companies Act 1948 with a nominal capital of £—— divided into —— shares of £—— each under the name of X Company Limited or such other name as shall be selected by A and accepted by the Registrar of Companies with a Memorandum and Articles of Association in the form of the Draft Memorandum and Articles of Association which has already been prepared and for the purpose of identification has been signed by A and B

(2) It is intended that the said shares shall be held as to —— shares by A and as to —— shares by B and that if and so long as A shall hold all such —— shares A shall be and remain a director and in fact the Chairman of the Board of Directors of the Company and shall not be liable to retire by rotation from the office of director of the Company and finally that if and so long as B shall be the holder of the said —— shares to be issued to him B shall remain and be a director of the Company and shall not be liable to retire by rotation from his office as director as aforesaid

(3) The Articles of Association of the Company contain provisions which give effect to the said intentions of A and B respectively mentioned in the preceding recital hereof (*a*)

(*a*) Note: the Articles of Association will provide for A and B being the first directors.

(4) A and B have also agreed between themselves first that each of them shall make a loan of £x to the Company upon the terms hereinafter appearing and secondly that A shall become and be the first Managing Director of the Company upon and subject to the terms of an Agreement which has already been prepared in draft and is expressed to be made between the Company of the one part and A of the other part and for the purpose of identification has been signed by A and B

(5) For the purpose of giving evidence of their ability to make the said loans referred to in the preceding paragraph hereof each of them A and B has already deposited with Messrs. —— of —— Solicitors the sum of £—— with irrevocable instructions in writing signed by him to pay over such sum to the Company immediately upon their being notified by either A or B that the Company has opened a current account with —— Bank Limited or such other Bank as the Board of Directors of the Company shall determine

(6) The parties hereto have agreed to enter into the covenants and agreements on their respective parts hereinafter contained for the purpose of giving effect to their intentions respectively hereinbefore referred to and generally with the object of carrying out the arrangements which they have made in connection with the Company and their respective interests therein

NOW THIS DEED made in pursuance of and for the purpose of giving effect to the recited agreement and for the valuable considerations hereinafter appearing WITNESSETH as follows:—

1. It is agreed by and between A and B as follows—

(a) That A shall forthwith proceed to procure the incorporation of the Company under the provisions of the Companies Act 1948 under the name of —— Company Limited or some other name similar thereto selected by A (whose decision shall be final) and acceptable to the Registrar of Companies with a nominal capital of £1,000 divided into 1,000 shares of £1 each and with a Memorandum and Articles of Association in the

form of the said draft Memorandum and Articles of Association hereinbefore referred to

(b) That each of them A and B shall be a subscriber to the Memorandum and Articles of Association of the Company

(c) That the costs incurred by A in connection with the preparation and printing of the Memorandum and Articles of Association of this Company and in procuring the registration of the Company as a private Company under the provisions of the Companies Act 1948 and all fees and stamp duties paid by A upon or in connection with the aforesaid registration shall unless paid by the Company within one month from the date of the Company's incorporation be borne and paid by A and B in equal shares and so that unless as aforesaid B shall on demand pay or repay to A one-half of the aforesaid costs stamp duties and registration fees

(d) That each of them A and B will immediately after the incorporation of the Company apply for cash at par and accept the allotment of the shares following in and forming part of the Company's authorised capital that is to say A —— shares and B —— shares and that A and B shall as directors of the Company promptly cause the agreed shares to be allotted and issued to A and B respectively Provided always that each of them A and B shall be entitled to require not more than one share allotted to him to be issued to his wife as his nominee

(e) That each of them A and B shall immediately after the incorporation of the Company lend to the Company a cash sum of £—— (making in all £—— to be lent) without security upon the terms following:—

(i) Each of such sums of £—— shall carry the right to interest at the rate of £—— per centum per annum payable half yearly

(ii) Unless in the meanwhile the Company shall have commenced to be wound up neither A nor B shall require the Company to repay the said sum of £—— lent by him to the Company or any part thereof for a period of ——

calculated as from the date of the incorporation of the Company

(iii) As from the expiration of the said period referred to in (ii) above neither A nor B shall unless in the meanwhile the Company shall have commenced to be wound up require the Company to pay to him in any one period of —— calendar months more than £—— in part repayment of his said loan of £——

(f) That each of them A and B shall when making the said loan of £—— to the Company hereinbefore provided for deposit with the Company at its registered office a letter addressed to the Company stating that he has lent such sum of £—— upon such terms as are set out in sub-paragraph (d) of this paragraph

(g) That neither A nor B shall by any means whatsoever revoke or attempt to revoke the said instructions in writing deposited by him with Messrs. —— referred to in the fifth recital of this Deed

(h) That if either of them A or B shall despite the provisions of sub-clause (e) above set out be given by the Company any security whatsoever for or in respect of his said loan of £—— to the Company or any part of such loan he will stand possessed of such security as trustee for A and B and their respective executors administrators and assigns in equal shares and proportions and shall be accountable accordingly

(i) That A and B shall be the first directors of the Company (*b*) and that the two of them shall procure the appointment of Messrs. —— of —— as the first auditors of the Company and Mr. —— of —— as the first secretary of the Company

(j) That A shall be the sole Managing Director of the Company and shall hold such office upon and subject to the terms and provisions of the said draft Agreement in writing referred to in the fourth recital hereof

(k) That B shall join with A in procuring that the Company do become party to and bound by the Agreement referred to in the preceding sub-clause and in addition B shall exercise

(*b*) The articles should *not* provide for retirement by rotation.

all rights of voting vested in him both as a member and as a director of the Company and do all such other acts and things (so far as it is within his power so to do) as shall be necessary in order to ensure that effect will be given to the foregoing provisions of this sub-clause and (in addition) the provisions of sub-clause (j) just hereinbefore contained

(l) That so long as either A or B respectively or his nominee shall be the holders of all the said —— shares for which they respectively have agreed to apply in accordance with the requirements of sub-clause (d) of this clause (i) the Articles of Association of the Company shall not be altered and (ii) the capital of the Company shall not be increased or in any way altered except (in either case) with the written consent of each of them A and B

(m) That so long as the Company shall be owing any part of the said sums of £—— each referred to in sub-clause (e) of this clause the Company shall not without the written consent of each of them A and B create any charge whether fixed or floating over its assets or any part thereof or give whether by way of assignment of book debts or otherwise any security whatsoever for any of the debts for the time being and from time to time of the Company

(n) For the purposes of sub-clauses (e) (h) (l) and (m) all references to A or B shall mean and include A or B (as the case may require) and his executors and administrators

2. Each of them A and B for himself and (wherever the context requires or admits) his executors and administrators hereby covenants with the other of them and his (wherever the context requires or admits) executors and administrators as follows:—

(1) Duly to observe perform and carry into effect all the provisions of clause 1 hereof so far as such provisions either expressly or by necessary implication require him so to do and to do all acts and things necessary for the purpose of giving effect to the foregoing

(2) Subject as hereafter provided not to do or cause to be done permit or suffer any act or thing whatsoever which shall

or may cause a breach of the provisions of clause 1 hereof or any of such provisions or which shall or may render it impossible for either the Company or A or B (as the case may be) duly to observe or carry into effect all or any of the aforesaid provisions Provided always that nothing hereinbefore contained shall be deemed to fetter any fiduciary discretions for the time being and from time to time vested in A or B as the case may be as a director of the Company

(3) In particular and without prejudice to the generality of sub-clauses (1) and (2) of this clause:—

(a) To propose or second (as the case may require) all or any resolutions at general meetings of the Company necessary for the purpose of giving effect to such of the provisions of clause 1 hereof as require some act or thing to be done or carried out or (as the case may be) not to be carried out or done by the Company and to exercise all rights of voting vested in him as a member of the Company in support of such resolutions and each of them

(b) Not at any time either to propose or to vote in support of any resolution at a general meeting of the Company which if duly passed would either result in the Company not giving effect to the provisions of clause 1 hereof or some of such provisions or cause the aforesaid provisions to cease to be operative or capable of taking effect or unless A shall be guilty of some act of gross misconduct result in the termination of A's employment by the Company as the managing director thereof under the terms of the said Agreement referred to in sub-clause (j) of clause 1 aforesaid or cause either A or B whilst holding the said shares to be issued to him as provided in clause 1 hereof to be removed from his office of director of the Company

(4) That so long as A shall be the managing director of the Company and A and B shall be the only directors of the Company

(a) A shall not claim or accept from the Company payment of any remuneration save and except such salary or remuneration as he shall from time to time be entitled to as the managing director of the Company

(b) B shall receive from the Company the sum of £—— per annum by way of remuneration in respect of his office of director of the Company

(5) That neither A nor B shall in his capacity as a member or contributory present to a court of competent jurisdiction a petition for the compulsory winding up of the Company without first notifying the other of them of his desire to sell all his shares in the Company in accordance with the requirements of the subsequent provisions of this clause and that if he shall commit a breach of the foregoing provisions of this sub-clause he will not proceed with such petition and will submit to an order dismissing such petition with costs

(6) That should either A or B be desirous of selling his shares in the Company or any of such shares he shall notify the other of them in writing of such his desire and such other of them shall have and is hereby granted the first option (to be exercised within three calendar months after the date of his receipt of the aforesaid notification in writing) of purchasing at a fair price per share (to be ascertained and fixed in manner and to be paid by the instalments respectively provided in the Schedule hereto) all the shares of whichever of them A or B (as the case may be) shall be so desirous of selling as aforesaid

(7) That should either A or B die during the life of the other of them such other or survivor shall have and is hereby granted the right or option (to be exercised within three calendar months after his receipt from the executors or administrators of a notice in writing that they have obtained probate of the Will or letters of administration of the estate of the deceased being whichever of them A or B shall have died to purchase all the shares in the Company of the one of them A or B (as the case may be) so dying as aforesaid at a fair price per share to be fixed in manner and to be paid by the instalments respectively provided for in the said Schedule hereto

(8) That for the purpose of giving effect to the provisions of the two preceding sub-clauses or either of them the provisions

of the Schedule hereto (hereinafter referred to as "the Schedule provisions") shall be duly observed performed and carried into effect by and between A and B and their respective executors and administrators and if and so far as shall or may be requisite or necessary the Scheduled provisions shall be deemed to be incorporated in this sub-clause

THE SCHEDULE ABOVE REFERRED TO

1. The executors or administrators of whichever of them A or B shall die during the life of the other of them must give notice in writing to such other of them of their having obtained probate of the Will or letters of administration of the estate of the deceased

2. For the purposes of the succeeding provisions of this Schedule each of the expressions below set out shall have the meaning attributed thereto and set out opposite the same that is to say:—

(a) "The agreed notice" means and is (i) in the case of either A or B being desirous of selling his shares or some of them the notification in writing given by him to the other of them of such his said desire and (ii) in the case of either A or B dying during the life of the other of them the notice in writing provided for in clause 1 of this Schedule

(b) "The Grantee" means and is whichever of them A or B (as the case may be) shall have been served with the agreed notice

(c) "The Grantor" means and includes (i) in the case of either A or B being desirous of selling his shares in the Company or some of such shares whichever of them A or B shall be so desirous as aforesaid and (ii) in the case of either A or B dying during the life of the other of them the executors or administrators of the one so dying as aforesaid

(d) "The said option" means the option granted to the Grantee under sub-clause (6) of clause 2 of this Deed or under sub-clause (7) of clause 2 aforesaid as the case may be

(e) "Fair price" means (i) the value per share of the Grantor's shares in the Company as at the date of the agreed

notice as mutually agreed in writing by and between the Grantor and the Grantee within one month after the Grantee's receipt of the agreed notice or (in the event of the Grantor and the Grantee failing so to agree in writing as aforesaid) the sum which the appointed valuer (as hereinafter defined) shall certify in writing as being in his opinion the fair value per share of the Grantor's said shares at the date of the agreed notice And in so certifying the appointed valuer shall be acting as an expert and not as an arbitrator and accordingly the Arbitration Act 1950 or other the Arbitration Act for the time being in force shall not apply

(f) "The appointed valuer" means and is the auditor of the Company at the date of the agreed notice or (if either the Grantor or the Grantee shall within one month of the service of the agreed notice upon the Grantee notify the other of them in writing that he is unwilling that the said auditor shall be the appointed valuer) the chartered accountant nominated by the President of the Institute of Chartered Accountants upon either the joint application of the Grantor and the Grantee or the application of the Grantor or the Grantee whichever of them shall first apply to the aforesaid President to make the aforesaid nomination after the expiration of one month after the service upon the Grantee of the agreed notice

2. The Grantor and the Grantee shall do or cause to be done all things necessary to ensure that the Company do make available to and shall not cause to be withheld from the appointed valuer such or any of such Balance Sheets documents and books of the Company as or which the appointed valuer shall require to be made available to him in order to enable him to fix or determine the fair price

3. The Grantee shall within three months after the date of the receipt of the agreed notice notify the Grantor of his willingness to exercise the said option or that he waives the option and in default of any such notification he shall be deemed to have waived the option

4. If the Grantee notifies his willingness as aforesaid the Grantor shall sell and the Grantee shall purchase all the shares

of the Grantor or if the Grantor shall be the personal representative of A or B (as the case may be) all the shares in the Company of which A or B shall die possessed at the time of his death at the fair price to be paid as below prescribed

5. If the Grantee shall notify his willingness as provided in clause 3 of this Schedule the Grantee shall pay and the Grantor shall accept payment of the aggregate amount of the fair price by six consecutive equal half-yearly payments or instalments the first of such half-yearly payments or instalments to be paid at the expiration of six months after and calculated as from the date of the agreed notice Provided always that if the Grantee shall make default for one month after the date upon which the same ought to have been paid in paying any one of the said instalments or if while any of such instalments shall remain unpaid the undertaking of the Company shall be sold or the Company shall commence to be wound up or the Grantee shall sell any of his shares in the Company then and in such event all the unpaid instalments shall be immediately payable by the Grantee to the Grantor

6. Upon the payment by the Grantee of each of the six instalments provided for in clause 5 of this Schedule the Grantor shall duly execute and deliver to the Grantee a transfer of one-sixth of the shares agreed to be purchased by the Grantee together with the document or documents of title relating to such shares

IN WITNESS, *etc.*

FORM 8

Mortgage of shares in a Private Company where the right to transfer shares is restricted and on the holder desiring to transfer the shares the other shareholders have an option to purchase (*a*)

(*Drafted by E. H. Bodkin, Esq., of Lincoln's Inn*)

THIS MORTGAGE is made the —— day of —— 19— BETWEEN A of etc. (hereinafter called "the Borrower" which expression shall where the context so admits include his executors administrators and assigns) of the one part and B of etc. (hereinafter called "the Mortgagee" which expression shall where the context so admits include his executors administrators and assigns) of the other part Parties.

WHEREAS:—

(1) The Borrower is the registered holder of —— shares in —— Ltd. numbered —— to —— inclusive Recitals; title to shares;

(*a*) In many modern forms of Articles of Association of private companies, the transfer of shares is restricted by requiring the holder who wishes to transfer his shares to serve a sale or transfer notice on the Company, whereupon the Company has the right to offer the shares to the other members, and to conclude a contract for sale on behalf of the shareholder with them. There is in such a case a difficulty in giving the Mortgagee a satisfactory security. If the Mortgagee attempts to exercise his power of sale by transferring the shares to a purchaser from him, the other members may elect to purchase them, and the Company will receive the purchase-money on account of the borrower as the registered holder of the shares. An effective security can, however, be created (subject to the risk of collusive action between the Borrower and the other members) by handing to the Mortgagee the Certificates of the shares, together with a sale notice and transfers in blank, and giving the Mortgagee power to complete the sale notice and transfers in the name of the borrower, and to receive the proceeds of sale—see *Hunter* v. *Hunter* [1936] A.C. at p. 248. The Mortgagee should serve a notice in lieu of distringas under R.S.C., Ord. XLVI, in order to prevent the borrower from serving a sale notice in fraud of the Mortgagee. Such a Mortgage is perhaps unlikely to be made frequently, but the Precedent can readily be adapted to other cases, *e.g.*, a deed of security on divorce —where a charge on the shares is required. If the Articles give the Company a lien on the shares for money due from the Borrower, notice of the Mortgage should be given to the Company.

Agreement for loan;

(2) The Mortgagee has agreed with the Borrower to lend him the sum of £—— upon having the repayment thereof with interest thereon at the rate hereinafter mentioned secured in manner hereinafter appearing

Deposit of Certificates, etc.

(3) The Borrower has deposited with the Mortgagee the Certificates of the said shares in —— Ltd. together with transfers in blank thereof and a sale notice in accordance with the Articles of Association of —— Ltd. aforesaid signed by the Borrower (*b*)

NOW THIS DEED made in pursuance of the said agreement and in consideration of the sum of £—— now paid by the Mortgagee to the Borrower (the receipt whereof the Borrower hereby acknowledges) WITNESSETH and it is hereby agreed and declared as follows:

Covenant for repayment.

1. THE Borrower hereby covenants with the Mortgagee to pay to the Mortgagee on the —— day of —— next the said sum of £—— with interest thereon in the meantime at the rate of £—— per cent. per annum from the date of this Deed And further that if the said moneys shall not be so paid to pay to the Mortgagee interest at the rate aforesaid by equal half-yearly payments on the —— day of —— and the —— day of —— in every year on the principal moneys for the time being remaining due on this security

Charge on shares.

2. THE Borrower AS BENEFICIAL OWNER hereby charges ALL the said shares in —— Ltd. and all shares bonus shares distributions (whether in cash or in any other form of valuable security) in the nature of capital issued or to be issued or made or allotted in respect of the said —— shares in —— Ltd. or any shares issued in respect thereof and all other shares or stock or securities of any nature whatsoever in —— Ltd. into with or for which the said —— shares in —— Ltd. or any shares issued in respect thereof may be converted consolidated subdivided or exchanged WITH the repayment to the

(*b*) If the transfer of the shares does not require to be by deed, the transfer may be signed by the Borrower. Whether signed or not, the Mortgagee would in that case be entitled to complete them and to procure himself to be registered as holder even before the power of sale had arisen.

Mortgagee of the principal moneys interest and other money hereby covenanted to be paid by the Borrower to the Mortgagee

PROVIDED ALWAYS that if the Borrower shall on the —— day of —— next pay to the Mortgagee the principal sum of £—— with interest thereon in the meantime at the rate of £—— per cent. per annum then the Mortgagee shall at any time thereafter at the request and cost of the Borrower re-transfer or transfer to the Borrower such (if any) of the said shares stock and securities hereby charged as shall have been transferred into the name of the Mortgagee or issued to the Mortgagee and shall deliver to the Borrower such of the said transfers in blank as shall not have been completed together with the said Notice of Sale and the Certificates of all the shares stock and securities hereby charged

Proviso for redemption.

3. THE Mortgagee may at any time or times after the said —— day of —— next sell and transfer the said shares stock and securities hereby charged or any of them in like manner as if the statutory power of sale had arisen and the provisions of the Law of Property Act 1925 relating to the exercise of the statutory power and all the provisions of the said Act with reference to sales effected thereunder shall apply respectively to the power of sale hereby conferred and to any sale effected thereunder as if such power were the statutory power

Power of sale.

4. THE Mortgagee may complete the said Notice of Sale and sign in the name of the Borrower any other requisite Notice of Sale and present the same notices to the Secretary of —— Ltd. in the name of the Borrower and may insert his own name or (after the power of sale hereby conferred shall have arisen) the name of any purchaser in all or any of the said transfers in blank and may in the name of the Borrower sign seal and deliver all or any of the said transfers and may cause such transfers to be registered and also may in the name of the Borrower receive and give a discharge to the Company for the proceeds of sale of any of the shares hereby charged which may be purchased by other members of —— Ltd. as aforesaid

Power of attorney.

5. THE Mortgagee may as well before as after the transfers of the said —— shares in —— Ltd. have been completed and

Power to receive dividends, bonuses, etc.

registered receive all dividends and distributions in the nature of income thereon and also on any other shares and securities hereby charged and the Borrower hereby authorises the Mortgagee as his attorney to receive or have allotted to him all other the shares or securities hereby charged and all capital distributions payable in respect thereof (*c*)

Borrower's Covenants;

6. THE Borrower hereby covenants with the Mortgagee and it is hereby agreed and declared—

To vote as directed;

(1) That he will during the continuance of this security forward by registered post to the Mortgagee all notices received by him in respect of all the said shares stock and securities hereby charged and will at the direction and expense of the Mortgagee attend the meetings convened by the said notices and exercise his right of voting or abstaining from voting as the registered holder thereof according to the directions of the Mortgagee

To pay calls;

(2) That he will during the continuance of this security duly and punctually pay all calls and instalments which may be made or become due in respect of all the shares hereby charged and that in default of his so doing the Mortgagee may make such payments and all sums so paid by the Mortgagee for that purpose shall be deemed to be properly paid by him

To permit shares to be revested in him;

(3) That the Borrower will if required by the Mortgagee permit all or any of the shares hereby charged to be revested in the Borrower in such manner as the Mortgagee shall think fit

To indemnify Mortgagee.

(4) That the Borrower will indemnify the Mortgagee his executors and administrators against all costs and liabilities which may be incurred or sustained by him or them in respect of any of the shares hereby charged

Charge of Mortgagee's expenses.

7. ALL costs charges and expenses properly incurred hereunder by the Mortgagee shall (together with interest thereon at the rate of £—— per cent. per annum) be charged on the property for the time being subject to this Security and shall on the same being paid be repaid on demand to the Mortgagee

(*c*) The Mortgagee, if he elects to receive the dividends, will become a mortgagee in possession.

by the Borrower with interest thereon from the time of payment at the rate aforesaid and until such demand shall be made and complied with the Borrower shall pay to the Mortgagee interest at the rate aforesaid on the moneys so paid and for the time being not yet repaid on the respective days appointed for payment of interest on the said principal sum of £——

IN WITNESS, *etc.*

FORM 9

Mortgage of fully paid shares and bearer bonds

(Drafted by E. H. Bodkin, Esq., of Lincoln's Inn)

Parties.

THIS MORTGAGE is made the —— day of —— 19— BETWEEN A of etc. (hereinafter called "the Borrower" which expression shall when the context so admits include his executors administrators and assigns) of the one part and B of etc. (hereinafter called "the Mortgagee" which expression shall when the context so admits include his executors administrators and assigns) of the other part

WHEREAS:—

Recitals; Agreement for loan;

(1) The Mortgagee has agreed with the Borrower to lend him the sum of £—— upon having the repayment thereof with interest thereon at the rate hereinafter mentioned secured in manner hereinafter appearing

Transfer of shares and deposit of Bearer Bonds.

(2) The Borrower has transferred the shares mentioned in the First Schedule hereto into the name of the Mortgagee and has deposited with the Mortgagee the Bearer Bonds mentioned in the Second Schedule hereto

NOW THIS DEED made in pursuance of the said agreement and in consideration of the sum of £—— now paid by the Mortgagee to the Borrower (the receipt whereof the Borrower hereby acknowledges) WITNESSETH and it is hereby agreed and declared as follows—

Covenant for payment.

1. The Borrower hereby covenants with the Mortgagee to pay to the Mortgagee on the —— day of —— next the said sum of £—— with interest thereon in the meantime at the rate of £—— per cent. per annum from the date of this Deed And further that if the said moneys shall not be so paid to pay to the Mortgagee interest at the rate aforesaid by equal half-yearly payments on the —— day of —— and the —— day of —— in every year on the principal moneys for the time being remaining due on this security

2. The Borrower AS BENEFICIAL OWNER hereby charges ALL the said Bearer Bonds mentioned in the said Second Schedule hereto with the repayment to the Mortgagee of the principal moneys interest and other money hereby covenanted to be paid by the Borrower to the Mortgagee

Charge of Bearer Bonds.

PROVIDED that if the Borrower shall on the —— day of —— next pay to the Mortgagee the principal sum of £—— with interest thereon in the meantime at the rate of £—— per cent. per annum the Mortgagee shall at any time thereafter at the request and cost of the Borrower retransfer to the Borrower the said shares mentioned in the said First Schedule hereto and shall deliver to the Borrower the said Bearer Bonds mentioned in the said Second Schedule hereto

Proviso for redemption

3. The Mortgagee may at any time or times after the said —— day of —— next sell the said shares and Bearer Bonds or any of them respectively in like manner as if the statutory power of sale had arisen and the provisions of the Law of Property Act 1925 relating to the exercise of the statutory power and all the provisions of the said Act with reference to sales effected thereunder shall apply respectively to the power of sale hereby conferred and to any sale thereunder as if such power were the statutory power (*a*)

Power of sale.

4. The Borrower hereby covenants with the Mortgagee that the Borrower will indemnify the Mortgagee his executors and administrators against all costs and liabilities which may be incurred or sustained by him or them in respect of any of the said shares

Indemnity.

5. [Clause 7 of Form 8]

IN WITNESS, *etc.*

Charge of Mortgagee's expenses.

THE FIRST SCHEDULE ABOVE REFERRED TO

[This will contain particulars of the shares transferred]

THE SECOND SCHEDULE ABOVE REFERRED TO

[This will contain particulars of the Bearer Bonds]

(*a*) If the express power of sale is omitted and reliance placed on the common law power, and the Mortgage is made under hand only, it will only require a 6d. stamp: Stamp Act, 1891, s. 22.

FORM 10

Master Agreement between a Contractor and Sub-Contractor regulating their position and preventing exploitation

THIS AGREEMENT under seal is made the —— day of —— 19— BETWEEN X Company Limited whose registered office is situate at —— etc. (hereinafter called "the Company") of the one part and AB —— etc. (hereinafter called "Mr. AB") of the other part

WHEREAS:—

(1) The Company are carrying on business as —— and are particularly concerned in the installation and maintenance of —— equipment for clients in the —— area and elsewhere

(2) The Company may from time to time be desirous of employing Mr. AB as a sub-contractor in connection with the furtherance of the Company's said business

(3) It has been agreed by and between the Company and Mr. AB that any and every contract or engagement which now exists or may hereafter be entered into between the Company and Mr. AB as sub-contractor as aforesaid (each of which said contracts or engagements is hereinafter called "an engagement") shall be upon the basis of and take effect subject to the provisions of this deed

Now in pursuance of the said agreement and in consideration of the premises THIS DEED WITNESSETH as follows:—

1. Mr. AB hereby covenants with the Company that he will not at any time hereafter take or permit to be taken from any records or information in the possession of the Company any copy of the names or addresses of any person or persons firm or company who shall at any time be or have been a customer or client of or other person dealing with the Company

2.—(1) Mr. AB hereby further covenants with the Company that during the continuance of an engagement and for a period of three years next following the determination of an engagement Mr. AB will—

(i) Not on behalf of himself or any other person or persons firm or company except the Company itself canvass or solicit

or procure to be canvassed or solicited any order or orders from or entice away from the Company any persons hereinafter specified and referred to as "the specified persons"

(ii) Not cause or permit to be disclosed to any of the specified persons the separate existence of Mr. AB's business entity or concern except in so far (if at all) as may be absolutely necessary in the course and for the purposes only of the due performance of that engagement

(iii) Not on behalf of himself or any other person or persons firm or company except the Company itself enter or cause to be entered into any contract relating to the installation or maintenance of —— equipment with any of the specified persons And without prejudice to any other rights or remedies of the Company if and as often as Mr. AB shall fail to comply with the terms of this covenant he shall be deemed in regard to any breach to have acted as a trustee for the Company and be accountable accordingly

(2) "the specified persons" means any person or persons firm or company who shall at any time during the continuance of the relevant engagement (a) have been a customer or client of or a person otherwise dealing with the Company and (b) have come into contact with Mr. AB or his servants or agents either directly or indirectly in consequence of that engagement

3. Mr. AB hereby further covenants with the Company that during the continuance and in the execution and performance or purported execution and performance of an engagement Mr. AB will—

(i) Not cause or permit to be displayed or shown any board placard or notice of whatsoever kind showing or referring to the identity of Mr. AB or of his business entity or concern or of any other business other than that of the Company

(ii) Act only in such a way as is calculated to or will in fact further the interests of the Company and not to act or in any way seek to further the interests of any other person or persons firm or company or of Mr. AB himself save and except in so far as such interests or any of them may be served by or through the Company

IN WITNESS, *etc.*

FORM 11

Deed of Family Arrangement between Beneficiaries under a Will to permit an unauthorised mortgage of Settled Land (*a*)

(Drafted by J. M. Bryan, Esq., of the Inner Temple, Barrister-at-Law)

THIS DEED is made the —— day of —— 19— BETWEEN AB of etc. (hereinafter called "Mrs. AB") of the first part CD EF and GH all of etc. farmers (hereinafter together called "the Sons") of the second part and X BANK LIMITED whose registered office is situate at —— etc. (hereinafter called "the Bank") of the third part SUPPLEMENTAL TO the Will (dated the —— day of —— 19— and proved on the —— day of —— 19— by the Bank as executor to the Testator next hereinafter defined in the —— Probate Registry) of B deceased (who was the husband of Mrs. AB and the father of the Sons and is hereinafter called "the Testator")

(*a*) This Form looks to the case when a mortgagee-bank is executor, and the will, although devising land in settlement, contains no appointment of Settled Land Act trustees, and there are no persons with either a present or future power of sale of any land comprised in the settlement. In such a case the Testator's widow and sons, being between them absolutely entitled in equity to the Settled Lands may by separate deed appoint themselves to be Settled Land Act trustees under the provisions of section 30 (1) (v) of the Settled Land Act, 1925; and until such an appointment is made the Bank, as a trust corporation and executor of the Testator's will, will be the trustee for the purposes of that Act under section 30 (3). The case envisaged is one where there is no tenant for life, the widow being merely an annuitant and entitled to the Settled Lands for her life only on failure by the Sons to perform certain conditions specified in the will. After their appointment the widow and sons will thus become statutory owners. This appointment should be executed immediately after the execution of this Form, and will itself be followed forthwith by the execution of a Vesting Assent to be made by the Bank in favour of the widow and sons as statutory owners, but this Vesting Assent is made subject of course to the Legal Charge in favour of the Bank already existing at the death of the Testator as mentioned in Recital (5). Such Vesting Assent must contain particulars of the additional powers conferred by this Form on the statutory owners, in accordance with the provisions of section 5 (1) (d) of the Settled Land Act, 1925.

WHEREAS:—

(1) The residuary estate of the Testator being insufficient to satisfy the payment of his just debts and funeral and testamentary expenses the only part of the estate of the Testator immediately available as security for such payment consists of the freehold properties respectively specified in the first and second parts of the First Schedule hereto (being the freehold properties specifically devised by the said Will upon the trusts or conditions therein mentioned and hereinafter called "the Settled Lands")

(2) The Bank (as Banker to Mrs. AB and the Sons) has with her and their full approbation and consent discharged by way of loan out of its own moneys all such liabilities as aforesaid together with the estate duty separately payable in respect of the Settled Lands

(3) On or about the —— day of —— 19— the Testator retired from the business of a farmer theretofore carried on by him upon the Settled Lands in co-partnership with the Sons (hereinafter called "the Former Partnership") and since the date of his retirement as aforesaid the Sons have continued the said business upon the Settled Lands in a new co-partnership together (hereinafter called "the Present Partnership")

(4) The several sums respectively specified in the First Second and Third Parts of the Second Schedule hereto (hereinafter together referred to as "the Existing Liabilities") are now owing to the Bank (a) in its capacity as such Executor of the Testator as aforesaid (b) as Banker to the Former Partnership and (c) as Banker to the Present Partnership respectively as each of them Mrs. AB and the Sons doth hereby respectively acknowledge and admit

(5) The only security in favour of the Bank at present subsisting in respect of the Existing Liabilities or of some or one of them consists of the Legal Charge of the Settled Lands effected by the Testator in favour of the Bank to secure advances to the Former Partnership and more particularly specified in the Third Schedule hereto

(6) Under or by virtue of the provisions of the said Will and of the statutory powers applicable in this behalf the estate

owner for the time being of the Settled Lands has and can exercise over the same lands only those powers conferred upon a tenant for life by the Settled Land Act 1925

(7) For the purposes hereinafter appearing Mrs. AB and the Sons being the persons who at the date of this Deed and subject to the Existing Liabilities or to any one or more of the same and to the said Legal Charge are between them absolutely entitled under the said Will to the Settled Lands and accordingly being all of full age and capacity are together able by virtue of their beneficial interests to dispose of the whole of the Settled Lands are desirous and have determined to extend the said powers in manner hereinafter appearing

(8) Mrs. AB and the Sons are together desirous of providing security by way of mortgage of or charge upon the Settled Lands for the Existing Liabilities (so far as not already provided by the said Legal Charge) and it is apprehended that the Sons may from time to time require further advances from the Bank (as Banker to the Present Partnership) for the purpose of the business carried on by the Sons as aforesaid

(9) The nature of this Deed and the effect as regards her beneficial interest or interests in the Settled Lands of the exercise of the powers hereby conferred together with the possible consequences in relation thereto arising by reason or as a result of the exercise of any powers provisions or remedies thereby made available to any mortgagee or chargee of the Settled Lands have been explained to Mrs. AB by Messrs. —— of —— Solicitors who have also explained to her that in such circumstances it would be proper and in accordance with usual practice for her to take independent legal advice before entering into this Deed but Mrs. AB after carefully considering such advice has absolutely declined to take any such independent legal advice as aforesaid

NOW THIS DEED WITNESSETH and it is hereby Agreed and Declared as follows:—

1. THIS Deed is made in pursuance of the aforesaid desire and determination of each and every party of the first and second parts hereto and by way of family arrangement with

the object of providing security by way of mortgage of or charge upon the Settled Lands for the Existing Liabilities and for each and every of them and of enabling Mrs. AB and the Sons or other the estate owner or estate owners for the time being of the Settled Lands to enter into such further or other arrangements with the Bank (A) as Banker to Mrs. AB and the Sons and (B) as Banker to the Present Partnership as are hereinafter respectively authorised

2. MRS. AB and the Sons or other the person or persons for the time being and from time to time entitled to exercise over the Settled Lands the powers by the said Act conferred upon tenants for life may henceforth exercise over or in relation to the Settled Lands the powers hereinafter contained by way of extension or enlargement of the powers and provisions of the said Act and with the like incidents effects and consequences as if the said powers had been conferred by the said Act that is to say:—

(1) A power to raise on mortgage of the Settled Lands or any part or parts thereof all or any moneys which may be required for any purpose whatsoever and so that no mortgagee or mortgagees advancing money on a mortgage purporting to be made under this present power shall be concerned to see that such money is wanted or that no more than is wanted is raised and so that the repayment of any moneys so raised as aforesaid with interest at such rate as the person or persons exercising this power may in his her or their absolute discretion think proper may be secured by a mortgage for any term of years or by a charge by way of legal mortgage of the hereditaments to be charged therewith and either with or without a power of sale and either with or without a provision that the principal moneys thereby secured shall not be called in or paid off for any period not exceeding seven years from the date of the mortgage and with such other powers and provisions and upon such terms in all respects as such person or persons may think expedient

(2) A power to rescind vary or add to the provisions of any mortgage or incumbrance affecting the Settled Lands or

any part or parts thereof and in particular to increase or otherwise vary the rate of interest payable under any such mortgage or incumbrance and to extend or otherwise vary the period during which the principal moneys secured by any such mortgage or incumbrance shall not be called in or paid off and to confer or impose upon the mortgagee or incumbrancer under any such mortgage or incumbrance any further or other rights powers and remedies or restrictions and to demise or charge by way of legal mortgage to any such mortgagee or incumbrancer any part of the Settled Lands by way of additional or substituted security and also to concur with all or any of the then existing mortgagees or incumbrancers in altering the priority of their respective securities

3. PROVIDED ALWAYS and it is hereby further expressly agreed and declared that save in the cases and for the purposes specified in the Fourth Schedule hereto the said additional powers shall not be exercised during the lifetime of Mrs. AB without her prior consent thereto such consent to be testified by a separate document in that behalf to be executed under her hand and seal and expressly referring to this Deed but so that no mortgagee or mortgagees advancing money on a mortgage purporting to be made under the above or any other powers or power shall be concerned to see that such consent has first been obtained

4. THE Sons hereby jointly and severally covenant with Mrs. AB and with her and each of her executors and administrators that they the Sons and each of them and their and each of their respective executors and administrators will at all times hereafter effectually save harmless and keep Mrs. AB indemnified against any diminution of the amount of any instalment of the Annuity payable to her during her lifetime under the provisions of the said Will and charged upon that portion of the Settled Lands specified in the said First Part of the said First Schedule if and to the extent that by reason or in consequence of the exercise either of the powers hereby expressly conferred or any of them or of the powers provisions or remedies or any of them thereby conferred upon any

mortgagee or mortgagees the rents or profits of the said portion of the Settled Lands or the said portion of the Settled Lands itself shall not be sufficient or available for the purpose of such payment

5. NOTWITHSTANDING the appointment of the Bank as Executor of the said Will it shall be lawful for any such mortgage of the Settled Lands as aforesaid to be effected with the Bank upon such terms as may be agreed between the Bank and the person or persons exercising the aforesaid powers

IN WITNESS, *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO

Part I. Particulars of that portion of the Settled Lands charged with payment of Mrs. AB's testamentary annuity

Part II. Particulars of the remaining portions of the Settled Lands

THE SECOND SCHEDULE ABOVE REFERRED TO

Part I.
II.
III. } Particulars of the Existing Liabilities

THE THIRD SCHEDULE ABOVE REFERRED TO

Particulars of the Legal Charge above referred to

THE FOURTH SCHEDULE ABOVE REFERRED TO

(1) A power to raise on mortgage of the Settled Lands or any part or parts thereof all or any moneys which may be required for the purpose of securing the repayment of the within-defined Existing Liabilities or any one or more of such liabilities

(2) If and so long as the within-defined Present Partnership shall continue and the Sons shall carry on the said business upon the Settled Lands or any part or parts thereof a power to raise on further mortgage of the same Lands all or part of any moneys required for the purpose of the said business not exceeding in any one year the sum of £——

FORM 12

Clause in Will for payment by Trustees of weekly sum to Housekeeper/Companion so long as she is not maintained by a local or similar Authority (*a*)

(*Drafted by Frederick Wm. Kay, Esq., Solicitor, Rochdale*)

I BEQUEATH the sum of £—— to my Trustees UPON TRUST to apply the same in manner following namely:—

(1) So long as my Housekeeper/Companion AB shall be residing on her own or with a Companion or living with a friend or friends or with relatives (and not in any accommodation provided by or at the expense of the Government or by or at the expense of a local authority or a benevolent or charitable Society Association or Institution) UPON TRUST to pay thereout to the said AB the sum of £—— per week for her life or until the said sum of £—— and any interest thereon has been exhausted [AND I DECLARE that this bequest is in addition to the legacy of £—— hereinbefore bequeathed to the said AB] AND I [FURTHER] DECLARE that for the purpose of paying the said sum of £—— per week my Trustees may leave in the bank and uninvested the whole or such part of the said sum of £—— as they may from time to time think fit

(2) Any balance of the said sum of £—— remaining on the death of the said AB shall fall into and form part of my residuary estate

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(*a*) Many Local Authorities provide homes for the aged, and where the inmates are in receipt of any pension or other income the Local Authority charges such inmates with the cost of their maintenance or a proportionate part thereof according to the income available.

It sometimes happens that a testatrix feeling under a moral obligation to a Housekeeper or Companion makes provision for such Housekeeper to the detriment of her own children. If the Housekeeper enters a home such provision is simply used to relieve public funds which would otherwise have been used for the benefit of the Housekeeper or Companion. In such circumstances the Housekeeper or Companion obtains no benefit from such provision.

FORM 13

Lease of Flat with services at a principal and a service rent, the latter varying with the cost of services

(*Drafted by Edward F. George*, LL.B., *Solicitor*)

THIS LEASE made the —— day of —— 19— BETWEEN Variable Services Limited whose registered office *etc.* (hereinafter called "the Landlords") of the one part and XY of *etc.* (hereinafter called "the Tenant") of the other part Parties.

WITNESSETH AS FOLLOWS:—

1. The Landlords hereby demise unto the Tenant All That the Flat (hereinafter called "the Flat") on the —— floor and being number —— in the building known as —— (hereinafter called "the Building") Together with etc. Yielding and Paying therefor first the clear yearly rent of £—— (hereinafter called "the Principal Rent") and secondly by way of a further or additional rent (hereinafter called "the Service Rent") the clear yearly rent of £—— in respect of the services hereinafter described provided by the Landlords for the benefit of the Flat the said Principal and Service Rents being payable by equal quarterly payments in advance on the usual quarter days the first of such quarterly payments to be made on the execution hereof and to be a proportionate amount of the said rents computed from the date hereof to the first quarter day next after the date hereof (*a*) Reddendum.

2. [*Tenant's covenants*]

3. The Landlords hereby covenant with the Tenant as follows:— Landlords' covenants.

(1) To pay the water rate in respect of the Flat Pay water rate.

(2) To keep the Building insured against loss or damage by fire and in case of damage or destruction by fire to lay out all insurance moneys paid to the Landlords in rebuilding and reinstating the Building including the Flat as speedily as possible Insure.

(*a*) It is assumed that the tenant will pay general rates, but the landlords water rate. If the landlords pay general rates the reddendum will have to extend to excess rates.

Maintain common parts.

(3) To use their best endeavours to keep the stairs and passages leading to the Flat well and sufficiently cleaned and lighted and to keep the roof and main structure of the Building the main drains thereof and the approaches thereto in reasonable repair

Supply hot water and maintain lift.

(4) To use their best endeavours to maintain a proper and adequate supply of hot water to the Flat for domestic purposes and to maintain the passenger lift in good working order and condition so however that the Landlords shall not be liable for any temporary discontinuance or stoppage of the said supply and lift service in the event of accident or other cause not due to the wilful default of the Landlords or for the purpose of the execution of cleaning maintenance or repairs or due to any restriction imposed by governmental or other lawful authority

Quiet enjoyment.

(5) That the Tenant paying the rent and observing the covenants on his part herein contained shall peaceably hold and enjoy the Flat during the said term without any interruption by the Landlords or any person lawfully claiming under or in trust for them

4. Provided always and it is hereby agreed as follows:—

(1) [*Proviso for re-entry*]

Escalator clause.

(2)—(i) In respect of the year commencing on the 29th day of September 19— (*b*) and each subsequent year the Service Rent shall be increased or reduced by a percentage (*c*) equal to the percentage increase or decrease in the cost of providing the services hereinafter referred to for the benefit of the Flat for the year ending on the 30th day of June 19— (*d*) or on the anniversary of such date in each subsequent year (as the case may be) compared with the cost of providing the services for the year ended on the 30th day of June 19— (*e*) Provided that the Service Rent shall not be increased or decreased unless the said percentage

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(*b*) This date will be governed by the landlords' financial year. Their auditors will have to be consulted to see whether they will have the figures in time and to confirm that they are prepared to give the necessary certificates. This clause has been accepted and operated without difficulty.

(*c*) It will be observed that the method of calculation allows a profit on increased costs proportionate to the profit on the basic costs.

(*d*) The end of the landlords' financial year.

(*e*) The last complete financial year prior to the grant of the lease.

increase or decrease shall be equal to at least five per cent. of the cost of providing the services for the year ended on the 30th day of June 19— (*e*) (*f*)

(ii) The percentage increase or decrease shall be calculated by the Landlords' auditors for the time being acting as expert accountants from information obtained from the books of account of the Landlords. The said auditors shall make such adjustments to and apportionments of the cost of providing the said services in each of the years in question as they consider fair and equitable to the Landlords and the Tenant and such adjustments and apportionments shall be final and binding on both parties Provided that in any year in respect of which the said auditors are of the opinion that the increase or decrease is unlikely to exceed five per cent. of the cost of providing the services for the year ended on the 30th day of June 19— (*e*) they may issue their certificate without making any detailed examination of the books of account of the Landlords' adjustments or apportionments

(iii) The services to be taken into account are all services supplied by the Landlords for the benefit of the Tenant including in particular the water rate on the Building the supply of hot water the maintenance repair redecoration and lighting (as the case may be) of the roof and main structure of the Building the main drains thereof and the approaches thereto and the entrances passages and staircases leading to the flats in the Building the insurance of the Building against loss or damage by fire (*g*) and the provision of the passenger lift and the porter

IN WITNESS, *etc.*

(*f*) It will be appreciated that in practice certificates may have to be issued where the increase or decrease over the previous year is very small indeed. For example, the second year of the term may show an increase of 7 per cent. over the basic year and the third year an increase of 8 per cent. Nevertheless, any other alternative is likely to involve cumbersome drafting.

(*g*) It may be desirable to extend the insurance to other risks, particularly third party risks, and thus eliminate or cut down the provision commonly found excluding the landlords' liability to the tenant and his visitors, especially having regard to the Occupiers' Liability Act, 1957.

FORM 14

Agreement for sale of part of a large house which the Vendor has contracted to purchase and which he is to convert into separate dwellings

(*Drafted by Ernest H. Scamell*, LL.M., *of Lincoln's Inn*)

Parties. AN AGREEMENT made the —— day of —— 19— BETWEEN AB of etc. (hereinafter called "the Vendor") of the one part and CD of etc. (hereinafter called "the Purchaser") of the other part

WHEREBY IT IS AGREED as follows:—

Agreement for sale. 1. The Vendor shall sell and the Purchaser shall purchase for an estate in fee simple for the sum of £—— ALL THAT the property fronting on to —— and known or to be known as Bleak House (hereinafter called "Bleak House") whereof a floor plan of the ground floor and of the first floor are contained in the plan annexed hereto and thereon shown coloured green and hatched black Together with the outbuilding lying to the —— of Bleak House the site whereof is also shown coloured green and hatched black on the said plan together also with the Courtyard shown hatched green and numbered 2 on the said plan Together also with the garden land shown edged in green and numbered 3 on the said plan AND Together also with the easements rights and privileges set forth in the First Schedule hereto Subject Except and Reserved unto the Vendor in fee simple the easements rights and privileges set forth in the Second Schedule hereto

Conditions incorporated. 2. The conditions of sale known as the National Conditions of Sale Sixteenth Edition shall apply hereto so far as the same are applicable to a sale by private treaty but so that in case of any variance or inconsistency between the terms hereof and the said National Conditions the former shall prevail over the latter and Condition 13 of the said National Conditions shall not have effect

3. A deposit and part payment of £—— [has been paid to Messrs. —— as —— prior to] [shall be paid to Messrs. —— as —— on] the signing hereof Deposit.

4. The purchase shall be completed on the —— day of —— 19— at the offices of Messrs. —— of etc. (*a*) or where they shall direct at which time and place the Purchaser shall pay the balance of the purchase price of £—— Completion.

5. The Vendor is not the legal owner of the property hereby contracted to be sold but he has an interest therein (together with certain other adjoining property) as purchaser under an Agreement dated the —— day of —— 19— and made between EF of the one part and the Vendor of the other part and the Purchaser shall take a conveyance of the property hereby contracted to be sold executed by the said EF the Vendor joining in and confirming such conveyance Title of Vendor.

6. The title shall commence with a —— dated the —— day of —— 19— and made between *etc.* Root of title.

7. The Purchaser shall in the Conveyance to him covenant with the Vendor and as a separate covenant with the said EF (*b*) for the benefit of the remainder of the property comprised in the said Agreement dated the —— day of —— 19— and every part thereof as follows: Purchaser's covenants:

(1) Not to build or erect or permit to be built or erected any building structure or erection whatsoever or place or permit to be placed any thing whatsoever in or on the Courtyard shown hatched green and numbered 2 on the plan annexed hereto without first obtaining the consent in writing of the owner in fee simple and of the occupier for the time being of the adjoining house known or to be known as Cosy House (hereinafter called "Cosy House") Not to build in the courtyard;

(2) Without prejudice to the generality of the foregoing covenant not to hang or permit to be hung or exposed in the Not to hang washing in courtyard;

(*a*) These will prima facie be the offices of the head Vendor: see clause 5.

(*b*) On the occasion of a sub-sale of part of the property, where the sub-sale of that part is completed at the same time as or before the remainder, it is desirable to join in the head-vendor as a covenantee in regard to positive covenants since the legal estate may still be in him: see *Webb* v. *Russell* (1789) 3 Term Rep. 393.

said Courtyard any clothes linen or other articles of any kind whatsoever

Not to cause a nuisance in courtyard;

(3) Not to use the said Courtyard for any purpose or in any way which might cause a nuisance or annoyance to the owners and occupiers of Cosy House

To maintain courtyard;

(4) To put keep and maintain the said Courtyard in a clean and tidy condition

To contribute towards costs of common parts;

(5) To contribute and pay one equal half part of the cost and expenses of maintaining and keeping in good repair and condition the land shown edged in red on the said plan [Provided that the Purchaser shall not be liable to make any contribution hereunder unless before the said costs and expenses are incurred an estimate of the amount thereof shall have been made and brought to the notice of the Purchaser and approved by him such approval not to be unreasonably withheld]

To maintain Bleak House;

(6) To put keep and maintain in good and sufficient repair and condition such of the internal and external walls of Bleak House as provide support or protection for any part of Cosy House

To procure covenants from successors.

(7) If and when the Purchaser shall transfer or create any legal estate in the property hereby conveyed or any part thereof in favour of any other person or persons to procure such other person or persons to enter into the following covenants which shall be expressed to be for the benefit of and enforceable by the Vendor or other the owner or owners for the time being of a legal estate in Cosy House or any part thereof to the intent that such covenants may be enforced directly against such other person or persons aforesaid by the owner or owners for the time being of Cosy House or any part thereof that is to say: (i) covenants in terms similar to the covenants contained in sub-clauses (4) (5) and (6) hereof or as near thereto as the circumstances may permit or require and (ii) a covenant in terms similar to the present covenant or as near thereto as the circumstances will permit or require

Covenant to maintain Cosy House.

8. The Vendor shall in the conveyance to the Purchaser covenant with the Purchaser to put keep and maintain in good and sufficient repair and condition that portion of the roof of

Cosy House as lies vertically above and provides protection for part of the ground floor of Bleak House

9. The conveyance to the Purchaser shall contain the following declaration:— Declaration:

(1) That every internal wall (including a cavity wall) separating Bleak House from Cosy House shall be a party wall severed medially As to party walls;

(2) That in the case of that part of Bleak House which is severed horizontally from a part of Cosy House the point or points of severance shall be the underside of the floor joists or other floor material lying immediately above that part of Bleak House (excluding any plaster or plaster board or other non structural material) and the ownership of all internal and external walls so severed shall be determined accordingly As to horizontal severance;

(3) That without prejudice to the operation of sections 78 and 79 of the Law of Property Act, 1925, the expressions "Vendor" and "Purchaser" where the context so admits include their respective successors in title and persons claiming through or under them As to the scope of covenants.

10. In consideration of the Purchaser having entered into this Agreement the Vendor will execute or cause to be executed such works and things as are necessary to render and make the building known or to be known as Bleak House aforesaid a self contained building distinct from the remainder of the building of which the said Bleak House forms a part in accordance in all respects with and subject to the Drawings and Specification of Works annexed hereto and in accordance with the requirements of the relevant local authorities. The said works and things shall be completed on or before the actual date of completion of the purchase herein and completion of the purchase shall be taken as an unconditional expression of satisfaction with and acceptance of all the said works and things Covenant by vendor to convert.

AS WITNESS, *etc.*

The First Schedule above referred to

Easements rights and privileges

1. Full right and liberty for the Purchaser and all persons authorised by him (in common with all other persons entitled to the like or any similar right) at all times by day or by night and for all purposes to go pass and repass over and along the land shown edged in red on the plan annexed hereto the Purchaser paying his due proportion of the costs and expenses of maintaining and keeping the said land in good repair and condition as herein provided

2. Such rights to subjacent and lateral support and to shelter and protection from Cosy House as have hitherto been enjoyed as quasi rights

3. The free and uninterrupted passage and running of water (including surface water) and soil gas and electricity from and to Bleak House through such sewers drains and watercourses cables pipes and wires which at the date of the conveyance to the Purchaser may be in under or passing through any part of Cosy House

The Second Schedule above referred to

Exceptions and Reservations

1. Easements rights and privileges over along and through Bleak House for the benefit of Cosy House corresponding to those granted under paragraphs 2 and 3 of the First Schedule hereto

2. All such further easements rights and privileges as immediately before the execution hereof were being enjoyed by Cosy House over Bleak House as quasi rights

FORM 15

Lease of Wayleave Rights in respect of a railway siding

(Drafted by J. M. Bryan, Esq., of the Inner Temple, Barrister-at-Law)

THIS LEASE is made the —— day of —— 19— BETWEEN XY Limited whose registered office is situate at etc. (hereinafter called "the Landlord" which expression where the context so admits shall include its successors in title and assigns) of the one part and PQ Limited whose registered office is situate at etc. (hereinafter called "the Tenant" which expression where the context so admits shall include its successors in title and assigns) of the other part Parties.

WHEREAS:—

(1) Under or by virtue of the two several leases specified in the Schedule hereto the Tenant is possessed for a term of —— years of the piece or parcel of land (hereinafter called "the Tenant's Land") situate at —— in the County of —— as the same is delineated on the Plan annexed hereto and thereon coloured pink and the Landlord is possessed for a term of —— years of the piece or parcel of land (hereinafter called "the Landlord's Land") adjoining the Lessee's Land as the same is delineated on the said Plan and thereon coloured blue Recitals: of title;

(2) Pursuant to an Agreement (hereinafter called "the Principal Agreement") dated the —— day of —— 19— and made between the British Transport Commission (hereinafter called "the Commission") acting by the Railway Executive (hereinafter called "the Executive") of the one part and the Landlord of the other part a copy whereof is annexed hereto the Commission constructed and laid down upon land belonging to the Commission certain siding connections and crossovers in the position shown on the said Plan and thereon coloured red and the Landlord has constructed and laid down in connection with and in continuation of the said sidings and crossovers of the Commission the railway lines indicated by parallel red lines of construction of siding;

upon the said Plan (all which said connections crossovers and lines are hereinafter collectively called "the Siding") terminating at the loading dock (hereinafter called "the Loading Dock") situate on the Landlord's Land and marked accordingly on the said Plan

of existing wayleave rights;

(3) By the Principal Agreement the Landlord in consideration of the annual rent therein mentioned and the provisions and conditions therein contained and on the part of the Landlord to be observed and performed has been granted certain rights and liberties over that portion of the Siding situate on the land of the Commission subject nevertheless to determination as therein mentioned and it was thereby agreed (*inter alia*) that (a) the said portion of the Siding situate on the land of the Commission should not without the written consent of the Commission be used for any purpose other than conveying traffic to and from the Landlord's premises for the purpose of the business of the Landlord and (b) the Landlord should not without such written consent assign its interest in the said portion of the Siding or permit any person to use the same

of Transport Commission's consent.

(4) By a memorandum bearing even date herewith and annexed hereto and made under the hand of the Estate Surveyor of the Executive of the —— Region the Commission has signified its consent to this Lease and each and every provision and condition respectively contained therein

Now this Lease witnesseth as follows:—

Demise of easements.

1. In consideration of the wagon rents or tolls hereinafter reserved or made payable to the Landlord by the Tenant and the covenants on the part of the Tenant hereinafter contained the Landlord hereby grants Unto the Tenant in common with the Commission the Landlord and all other persons or corporations who may from time to time be entitled to use or exercise the like rights all those the Rights and Liberties following that is to say:—

(1) Full Right and Liberty at the sole cost and expense of the Tenant and by its servants agents and workmen to bring or cause to be brought on to the Siding at the point of its junction with the public railway of the Commission (as the

same junction is indicated by the letter "X" marked on the said Plan) the trucks or wagons and engines of the Commission (or in cases where the Commission may authorise the Tenant to use the same any other trucks wagons or engines) between the said junction and the Loading Dock for the purposes of the business of the Tenant

(2) Full Right and Liberty at the sole cost and expense of the Lessee and by its servants agents and workmen to load and unload on the —— side of the Loading Dock all such trucks and wagons and engines as aforesaid and to convey the same between the Loading Dock and the Tenant's Land over and across that part of the Landlord's Land which is indicated on the said Plan and thereon hatched in black

TO HOLD the same Rights and Liberties UNTO the Tenant for the term of —— years or earlier determination of the Principal Agreement Subject nevertheless to determination as hereinafter provided

Reddendum.

2. THE Tenant shall pay to the Landlord a wagon rent or toll of Five Shillings for each wagon or truck upon every occasion on which the same shall be brought on to the Siding in exercise of such Rights and Liberties as aforesaid and such wagon rents or tolls shall be allowed to accumulate during any single quarterly period ending on one of the usual quarter days and shall be paid on the quarter day ending any such period or within 7 days thereafter

Tenant's covenants.

3. THE Tenant hereby covenants with the Landlord as follows:

(1) To pay the said wagon rents or tolls hereinbefore reserved or made payable at the times and in the manner hereinbefore fixed for payment thereof without any deduction except for landlord's property tax (if any)

(2) To keep proper books and accounts of all wagons or trucks which shall be brought on to the Siding as aforesaid and at all reasonable times to allow such books and accounts to be inspected and copied by the Landlord through its duly authorised agents

(3) Not to bring on to the Siding more than —— wagons or trucks in all in any one day

(4) Not to assign underlet or part with any interest of the Tenant in the Siding under this Lease without the previous written consents of the Commission and the Landlord respectively nor without such respective written consents as aforesaid to permit any person or corporation to use the Siding

(5) Only to use the Siding for the purposes of the business of the Tenant

(6) At all times in the exercise of such Rights and Liberties as aforesaid to observe and perform all the provisions and conditions contained in the Principal Agreement and on the part of the Landlord to be observed and performed except the provision for payment of the rent thereby reserved and at all times (except as aforesaid) to save harmless and keep effectually indemnified the Landlord from and against all the said provisions and conditions and from all claims actions costs and demands in respect thereof

Quiet enjoyment.

4. THE Landlord hereby covenants with the Tenant that the Tenant paying the said wagon rents or tolls at the times and in the manner hereinbefore provided and performing and observing the covenants on the part of the Tenant and conditions hereinbefore contained may peaceably enjoy the Rights and Liberties hereinbefore granted without any interruption from the Landlord or any person lawfully claiming through under or in trust for the Landlord

Provisos.

5. PROVIDED Always and it is hereby further declared that:

(1) All wagons and trucks brought on to the Siding in exercise of such Rights and Liberties as aforesaid shall so far as practicable be marshalled and conveyed by the Tenant in such order and manner as at all times to give priority to the wagons and trucks brought on to the Siding by the Landlord

(2) If at any time either of them the Landlord or the Tenant shall give to the other of them notice in writing signed by it or its respective agent stating an intention to determine this Lease at a date specified in such notice being one of the said quarter days falling not less than 2 months after the date of the giving of such notice and if in the case of such a notice being given by the Tenant all rents or sums due or

payable by the Tenant under the provisions hereof shall have been paid or satisfied down to the date for determination specified in such notice then upon the date so specified this Lease and everything herein contained shall absolutely cease and determine but without prejudice to the remedies of either the Landlord or the Tenant in respect of any antecedent breach of any of the covenants and conditions herein contained

IN WITNESS, *etc.*

THE SCHEDULE ABOVE REFERRED TO

[*Particulars of the two several leases under which the Tenant and the Landlord respectively hold the above defined "Tenant's Land" and "Landlord's Land"*]

FORM 16

Trust deed by persons holding moneys collected by public subscription for the purpose of establishing a memorial fund for prizes for student nurses at various hospitals (*a*)

(*Drafted by Miss Mary Holt, Barrister-at-Law*)

Recitals. THIS TRUST DEED is made this —— day of —— 19— by AB of —— CD of —— EF of —— GH of —— and IJ of —— (hereinafter called "the Original Trustees")

WHEREAS:—

(1) Dr. MB late of —— who died on the —— day of —— 19— for many years practised as a doctor and physician in the districts of R—— and L—— in the County of —— and was during his lifetime held in very high regard and esteem by the inhabitants of the said districts

(2) After the death of the said Dr. MB certain of the inhabitants of the said districts being desirous of perpetuating his memory held a meeting at which a Committee was elected known as the Dr. MB Memorial Fund Committee for the purpose of collecting a sum of money to endow a prize fund for nurses and student nurses at certain hospitals with which the said Dr. MB was during his lifetime connected in memory of the said Dr. MB and of electing trustees to be trustees of the said sum of money when collected and of the said prize fund

(3) As a result of the efforts of the said Dr. MB Memorial Fund Committee and of the generosity of the inhabitants of the said districts a capital sum of £—— has been collected

(4) The Original Trustees have been elected by the said Dr. MB Memorial Fund Committee to be trustees of the said prize fund and to hold the same upon the trusts hereinafter declared concerning the same

(*a*) Stamp 10s. This form can be adapted to meet the case where a fund is given by a settlor to trustees for the purpose of establishing prizes at a school or other institution.

(5) The said sum of £—— has been recently invested in the names of the Original Trustees in —— at —— per cent.

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED as follows:—

1. The Charity hereby founded shall be called "The Dr. MB Memorial Prize Fund" Name of charity.

2. In this Deed the following expressions shall have the following meanings that is to say:— Definition clause.

(a) "The Trustees" means the Original Trustees or other the trustees or trustee for the time being of this Deed

(b) "The Trust Fund" means and includes the said sum of £—— and all moneys and other property received and accepted by the Trustees upon the trusts of this Deed and the investments and property from time to time representing the same or any part thereof

3. The Trustees shall hold the Trust Fund and the income thereof upon trust for the purposes and subject to the provisions hereinafter contained Declaration of trust.

4. Subject as hereinafter provided the net annual income to arise from the Trust Fund shall be divided by the Trustees into three equal parts and Declaration of charitable purposes.

(i) one equal third part of the net annual income of the Trust Fund shall be applied in each year in the purchase of 4 Prizes or in providing 4 equal sums in cash as prizes one of which shall be given at the end of each quarter of the year to such Pupil Midwife at the V—— Royal Infirmary who (subject as hereinafter provided) shall be deemed by the Matron for the time being of the said Infirmary to be the most meritorious Pupil Midwife for such quarter taking into consideration examination results and other work in Midwifery and also with due consideration of the Pupil Midwife's character Provided that any Pupil Midwife who shall have received a prize hereunder in respect of any one quarter of the year shall not be eligible to be awarded another prize hereunder in any other quarter of that or any other year

(ii) one equal third part of the net annual income of the Trust Fund shall be applied in each year in the purchase of

2 Prizes of unequal value or in providing 2 unequal sums in cash as prizes one of which shall be given to each of the two students of nursing who shall be considered by the Matron for the time being of the S—— Hospital —— aforesaid to be the best all round Student Nurse and the best all round Cadet Nurse respectively in each year at the said Hospital taking into consideration examination results and other nursing work of such students and the character of such students Provided Always that in each year the value of the Prize or payment in cash to be made to the student who shall be considered to be the best all round Student Nurse in such year shall always be greater than the value of the Prize or payment in cash to be made to the student who shall be considered to be the best all round Cadet Nurse And Provided Always that the exact relative proportionate values of such Prizes or payments shall from time to time be fixed by the Matron for the time being of the said Hospital whose decision shall be final

(iii) the remaining equal third part of the net annual income of the Trust Fund shall be applied in each year in the purchase of 2 Prizes of unequal value or in providing 2 unequal sums in cash as prizes to be given to the 2 Nurses at the Royal Infirmary B—— in the said county who shall be considered by the Matron for the time being of the Royal Infirmary B—— aforesaid (after consultation if necessary with such Members of the Medical and Nursing Staffs of the said Infirmary as she shall consider necessary) to be respectively the best and the second best Nurses at the said Infirmary in such classes of work during their training as Nurses as the Matron of the said Infirmary for the time being shall decide Provided Always that the exact relative proportionate values of such Prizes or payments shall from time to time be fixed by the Matron for the time being of the said Infirmary whose decision shall be final

Name of prizes.

5. The Prize to be awarded in each case shall be known as "The Dr. MB Memorial Fund Prize" and shall not be awarded more than once to the same person

Eligibility clause.

6. No person shall be eligible to receive any of the Dr. MB Memorial Fund Prizes unless he or she is of British Nationality

7. The respective decisions of the Matron for the time being of the V—— Royal Infirmary and of the Matron for the time being of S—— Hospital aforesaid and of the Matron for the time being of the Royal Infirmary B—— aforesaid as to the award of the respective Prizes and as to the eligibility of the recipients thereof shall be final and conclusive in each case and binding on all parties

Clause making decision of arbiter final.

8. The Trustees shall be at liberty out of the net income of the Trust Fund to purchase books instruments or other articles of practical use as Prizes to be awarded under these presents or such prizes or any of them may at the discretion of the Trustees take the form of cash payments or may be partly in cash and partly in books instruments or other articles of practical use as the Trustees may in each case think proper

Power of trustees as to purchase of prizes.

9. The Trustees may from time to time vary the investments representing the Trust Fund and may from time to time sell all or any investments thereof but all moneys requiring investment shall be invested in securities authorised by law for the investment of trust funds

Investment clause.

10. The statutory power of appointing new trustees hereof shall apply to these presents

Power of appointing new trustees.

IN WITNESS, *etc.*

FORM 17

Mortgage by a builder developing freehold land by the erection of dwelling-houses with provision for releasing the dwelling-houses on completion and sale

(*Drafted by Peter Elman, Esq., of the Middle Temple*)

THIS MORTGAGE is made the —— day of —— 19— BETWEEN AB of etc. —— (hereinafter called "the Borrower") of the one part and CD of etc. —— (hereinafter called "the Mortgagee") of the other part

WHEREAS:—

(1) The Borrower is the estate owner in fee simple of the land particulars of which are set out in the Schedule hereto (hereinafter called "the Estate") and intends to develop the same by the building and erection of dwelling-houses with appurtenances thereto in accordance with the plans and specifications copies of which are annexed hereto and in conformity with the provisions of the Town and Country Planning Act 1947 the conditions subject to which any planning permission may have been or shall be granted and all building and other regulations conditions and requirements of the local authority

(2) The Mortgagee has at the request of the Borrower and in the manner hereinafter appearing agreed to make advances to the Borrower from time to time in order to enable the Borrower to complete the building and erection of the said dwelling-houses and the appurtenances thereto as aforesaid but nevertheless not exceeding in the aggregate the sum of £—— upon having the repayment thereof with interest thereon as hereinafter mentioned secured in the manner hereinafter appearing

Now in pursuance of the said agreement THIS DEED WITNESSETH AND IT IS HEREBY DECLARED as follows:—

1. Subject as hereinafter provided the Mortgagee will from time to time advance to the Borrower for enabling the Borrower

to complete the building and erection of the said dwelling-houses and the appurtenances thereto as aforesaid the aggregate sum of £—— by instalments of sums (hereinafter called "the periodic sums") being not less than the amount shown upon the stage certificates of —— or other the architect for the time being of the Borrower (hereinafter called "the Architect") confirmed and accompanied by the contemporaneous stage certificates of —— or other the quantity surveyor of the Mortgagee (hereinafter called "the Surveyor") showing in detail how such periodic sums are calculated

PROVIDED ALWAYS that

(a) The Borrower shall be at liberty from time to time to require the Architect and Surveyor and each of them to prepare and deliver to the Borrower and the Mortgagee the said respective stage certificates but so that there shall be an interval of not less than one month between one stage certificate and the next one

(b) The amount of the periodic sums so certified as aforesaid shall be equal to —— per cent. of the total value of the work properly executed and of the materials and goods reasonably and properly used in the building and erection of the said dwelling-houses and appurtenances thereto up to and including a date not more than 7 days before the date of the said respective stage certificates less any periodic sums previously paid by the Mortgagee to the Borrower hereunder

(c) The periodic sums shall be inclusive of architect's and surveyor's fees and expenses or a due proportion thereof as may in the opinion of the Architect and Surveyor be properly attributable to the development of the Estate as aforesaid at the date of the then current periodic stage certificate less any sums previously paid in respect thereof

(d) The periodic sums certified as aforesaid shall be paid by the Mortgagee to the Borrower or as the Borrower shall direct within seven days after the receipt by the Mortgagee of the appropriate stage certificates as aforesaid

(e) The Mortgagee shall not be bound to advance or continue to advance any periodic sums if at the time when such advance

ought to be made hereunder any of the events upon the happening of which the power of sale and of appointing a receiver is under the provisions hereinafter contained made exercisable shall have happened

(f) The obligation of the Mortgagee to advance or continue to advance any periodic sums shall cease if the Borrower shall not in the opinion of the Mortgagee make all reasonable and proper progress in the building and erection of the said dwelling-houses as aforesaid

(g) The benefit of the covenant on the part of the Mortgagee hereunder is personal to the Borrower and shall not be capable of being assigned to any person firm or company without the previous consent in writing of the Mortgagee first had and obtained

(h) The security hereby constituted shall extend to all and every of the periodic sums advanced notwithstanding that the obligations of the Mortgagee to advance or continue to advance the same shall for any reason whatsoever have ceased or shall never have existed

2. In consideration of the advances to be made as hereinbefore provided the Borrower hereby covenants with the Mortgagee to repay to the Mortgagee on demand in writing every periodic sum advanced and all costs and expenses incurred by the Mortgagee hereunder together with interest thereon at the rate of —— per cent. *de diem ad diem* from the date when such advance was made or such costs and expenses incurred as aforesaid (such interest to be paid and computed both before and after any demand and as well after as before any judgment or order to be recovered or made hereunder) up to the date of actual repayment of the advance

3. For the consideration aforesaid the Borrower as Beneficial Owner hereby charges by way of legal mortgage the Estate and the said dwelling-houses built and erected or to be built and erected thereon together with the fixtures plant machinery fittings and apparatus and the materials and goods belonging thereto (not being personal chattels within the Bills of Sale Acts) with the payment of all principal and other moneys

advanced and the interest thereon hereby covenanted to be paid by the Borrower to the Mortgagee PROVIDED ALWAYS that upon payment by the Borrower to the Mortgagee of all principal and other moneys advanced hereunder and the interest thereon as aforesaid the Mortgagee will at the request and cost of the Borrower duly discharge this security

4. Provided always and it is hereby declared as follows that is to say:—

(a) At any time during the continuance of the security herein constituted and before the power of sale vested in the Mortgagee shall have become exercisable the Borrower may sell the Estate or any dwelling-house erected or to be erected thereon at such price as he shall think fit not being less than the price which shall have been approved in writing by the Mortgagee and in case of any such sale the Mortgagee will upon payment to him of the balance of the purchase money after payment thereout of the costs charges and expenses properly incurred as incident to such sale convey or concur in conveying to the Purchaser the property sold and any purchase money so paid to the Mortgagee shall be applied by him first in discharge of the interest then due hereunder and secondly in discharge of the periodic sums and all the costs and expenses then already advanced and incurred by the Mortgagee hereunder and the residue of the said purchase money if any shall be paid to the Borrower and

(b) If the Borrower shall comply with all his obligations hereunder including his obligations in regard to payment over of purchase money on any sale as aforesaid but not including his obligations in regard to the payment of principal and interest the lender will not during the period of —— years from the date hereof or until the Estate is completely developed as aforesaid whichever is the longer period take any steps to enforce the payment of the said aggregate sum of £—— or any part thereof

5. The Borrower hereby further covenants with the Mortgagee in manner following that is to say:—

(a) The Borrower will complete or cause to be completed the development of the Estate with all due diligence and in accordance with the said plans and specifications or any reasonable modification thereof as the Borrower may be advised by the Architect and Surveyor and in conformity with the provisions of the Town and Country Planning Act 1947 the conditions subject to which any planning permission may have been granted and all building and other regulations conditions or requirements of the local authority

(b) At all times during the continuance of this security the Borrower will insure or cause to be insured with reputable and responsible insurers all dwelling-houses erected or to be erected in the development of the Estate and the said fixtures plant machinery fittings and apparatus and the materials and goods belonging thereto against loss or damage by fire in the joint names of the Borrower and Mortgagee in such a sum as the Architect and Surveyor shall certify as being advisable and will increase such insurance (in accordance with the advice of the Architect and Surveyor) from time to time as the said dwelling-houses approach completion so that the same and the said fixtures plant machinery fittings and apparatus and materials and goods belonging thereto may continuously be and remain insured in a sum equal to the full value thereof for the time being And the Borrower will duly and punctually pay all premiums necessary for effecting and maintaining the said insurance when the same becomes due and will on demand deliver to the Mortgagee the policy of such insurance and the receipt or receipts for every such premium AND if the Borrower shall make default in effecting and maintaining such insurance as aforesaid the Mortgagee shall be at liberty to effect and maintain the same and all moneys expended by the Mortgagee under this provision shall on demand be repaid to the Mortgagee by the Borrower and until such repayment shall be deemed to be expenses properly incurred by the Mortgagee for the purposes of Clause 2 hereof

(c) When the development of the Estate is completed the Borrower will keep or cause to be kept all the dwelling-houses

erected thereon and all the said fixtures plant machinery fittings and apparatus and materials and goods belonging thereto for the time being subject to this security in good substantial and decorative repair and working order and condition And it shall be lawful for the Mortgagee and his architect and surveyors workmen and other agents or servants at any time or times to enter upon the Estate and the dwelling-houses erected or to be erected thereon or any part thereof to examine the state and condition thereof and of any decays defects and wants of reparation and amendment there found to give and leave notice in writing on or at the Estate or any part thereof and the Borrower will forthwith after such notice well and sufficiently repair amend and make good the same accordingly

(d) The Borrower will not sever or permit to be severed from the Estate or the dwelling-houses erected thereon or to be erected thereon any fixtures plant machinery fittings or apparatus or materials or goods belonging thereto or now or hereafter affixed thereto or placed thereon except for the purpose of renewing or replacing the same by others of equal or greater value and convenience and not of diminishing in any way the value of the Estate and the dwelling-houses erected or to be erected thereon and the said fixtures plant machinery fittings or apparatus and materials and goods belonging thereto and to be subject to this security

(e) The Borrower will not without the previous consent in writing of the Mortgagee dispense with the services of the Architect or appoint or engage another in his place

(f) The Borrower will as and when it shall under Clause 1 hereof become entitled to require the same to be made apply to the Mortgagee for and shall accept the periodic sums provided to be advanced under the said clause

(g) The Borrower will not without the previous consent in writing of the Mortgagee obtain from any other person or source the advance of any moneys for the purpose of continuing or completing the development of the Estate except upon the terms that the said aggregate sum of £—— to be advanced under Clause 1 hereof and all other moneys secured hereby

whether or not the same shall then in fact have been advanced or have become due hereunder prior to the date of any such other advance being made shall for all purposes rank before such other advance

(h) Every periodic sum advanced by the Mortgagee to the Borrower hereunder shall be applied for the purpose of continuing and completing the development of the Estate as aforesaid and for no other purpose whatsoever and the Borrower will not create or purport to create any charge whatsoever on the Estate or the dwelling-houses erected or to be erected thereon or the said fixtures plant machinery fittings or apparatus or materials or goods belonging thereto or on any part thereof ranking in priority to or *pari passu* with any periodic sum advanced or to be advanced under and secured by these presents

(i) At all times during the continuance of this security the Borrower will not do or omit or permit to be done or omitted any act matter or thing in upon or in respect of the Estate and the dwelling-houses erected or to be erected thereon or any part thereof in contravention of the provisions of the Town and Country Planning Act 1947 or the conditions subject to which any planning permission may have been granted or any building or other regulations conditions or provisions of the local authority or the exceptions and reservations or rights or restrictive and other covenants subject to which the Estate is held by the Borrower and will effectually indemnify and keep the Mortgagee indemnified from and against all costs charges expenses or liabilities incurred in consequence of the Borrower doing or omitting or permitting to be done or omitted any act matter or thing as aforesaid

(j) The Borrower will not without the previous consent in writing of the Mortgagee exercise any of the powers of leasing or agreeing to lease vested in or conferred on mortgagors by Common Law or by statute or suffer to be created a tenancy of any description of the dwelling-houses erected or to be erected on the Estate or accept or agree to accept a surrender of any lease or tenancy

(k) At all times during the continuance of this security the Borrower will duly and punctually pay and discharge and indemnify and keep the Mortgagee indemnified against all rates taxes duties charges assessments and outgoings whatsoever assessed charged or imposed upon or payable in respect of the Estate or any dwelling-houses erected or to be erected thereon or any part thereof and will deliver the receipts therefor to the Mortgagee on demand and if the Borrower shall at any time refuse or neglect to make such payments the Mortgagee shall be at liberty to make the same and all moneys expended by the Mortgagee under this provision shall on demand be repaid to the Mortgagee by the Borrower and until such repayment shall be deemed to be expenses properly incurred by the Mortgagee for the purposes of Clause 2 hereof

6. All moneys becoming payable by any insurance company in respect of any insurance which have at the date hereof or shall hereafter during the subsistence of this security be effected by or on behalf of the Borrower in respect of the Estate or the dwelling-houses erected or to be erected thereon or the said fixtures plant machinery fittings and apparatus and materials and goods belonging thereto or any part thereof shall be deemed to be moneys payable on insurances for the maintenance of which the Borrower is liable hereunder and shall be applied by the Borrower accordingly

7. This security shall become enforceable forthwith and the statutory power of sale and of appointing a receiver conferred by the Law of Property Act 1925 shall become immediately exercisable by the Mortgagee without the necessity of giving notice in that behalf in any of the following events that is to say:—

(a) If default shall be made in the repayment of principal and other moneys hereby secured for —— days after the date on which the Mortgagee shall require payment of the same

(b) On any breach on the part of the Borrower of any covenant or obligation herein contained or implied

(c) If the Borrower shall go into liquidation other than for purposes of reconstruction or reorganisation or shall become

bankrupt or have a receiving order made against him or enter into any arrangement or composition with or for the benefit of its or his creditors or

(d) If a receiver of any property belonging to the Borrower or of the rents or profits thereof shall be appointed or any distress or execution shall be levied upon any such property and shall not be paid within —— days

8. Any receiver appointed by the Mortgagee hereunder shall have full powers in the name of or otherwise on behalf and at the expense of the Borrower but not without the consent of the Mortgagee to continue and complete the development of the Estate as aforesaid or otherwise as may be deemed necessary and advisable and to manage sell let deal with or dispose of the Estate or the dwelling-houses erected or to be erected thereon and the said fixtures plant machinery fittings and apparatus and materials and goods belonging thereto or any part thereof in any manner whatsoever and with all powers in that behalf of an absolute beneficial owner and to execute carry out and do all such instruments acts matters and things as may be considered proper or advisable for any such purpose and the Borrower hereby irrevocably appoints such receiver to be his attorney for all or any of the purposes mentioned in this clause and hereby ratifies and confirms and agrees to ratify and confirm whatsoever such attorney shall do or purport to do by virtue of the powers hereinbefore mentioned

9. If and when the said power of sale shall become exercisable the Mortgagee shall be at liberty to enter upon and take possession of the Estate and the dwelling-houses erected thereon and all the said fixtures plant machinery fittings and apparatus and materials and goods belonging thereto and either by himself or by or through any attorney substitute or agent to continue and complete the development of the Estate as aforesaid or otherwise as the Mortgagee may think fit and pay such money and incur such expenses as in his discretion the Mortgagee may think fit in relation to such development

10. The Borrower hereby irrevocably appoints the Mortgagee to be his attorney for all or any of the purposes of these

presents and generally to act as to the Mortgagee shall seem proper and to appoint and remove at pleasure any attorney substitute or agent to act under the Mortgagee in respect of such purposes or any of them And the Borrower hereby ratifies and confirms and agrees to ratify and confirm whatsoever the Borrower or its attorney substitute or agent shall do or purport to do by virtue of this clause And all moneys expended by the Mortgagee or his attorney substitute or agent hereunder shall be deemed to be expenses properly incurred by the Mortgagee for the purposes of Clause 2 hereof

11. Section 93 of the Law of Property Act 1925 shall not apply to this security

12. All sums at any time to be expended paid or debited in account (including any advances to be made) by the Mortgagee whether by himself or through any such receiver attorney substitute or agent as aforesaid for any of the purposes referred to in this Deed or for costs and expenses incurred by the Mortgagee at any time in relation to this security or any prior incumbrance dealing or disposition or for or in connection with the protection of this security shall be deemed to be properly expended paid or incurred by the Mortgagee or the said receiver attorney substitute or agent and shall be repaid by the Mortgagee by the Borrower on demand with interest thereon at the rate aforesaid and until so repaid shall be added to the principal moneys hereby secured and shall with interest thereon at the rate aforesaid be charged on all the property subject to this security Provided that the charge hereby conferred shall be in addition without prejudice to any remedy lien or security which the Mortgagee may or but for the charge in this Clause contained would have for the moneys referred to in this Clause or any part thereof

13. The Borrower shall be entitled to redeem this security at any time after the —— day of —— on giving to the Mortgagee —— calendar months' previous notice in writing of its intention so to do or by paying —— calendar months' interest at the rate aforesaid in lieu of notice

IN WITNESS, *etc.*

THE SCHEDULE ABOVE REFERRED TO

FORM 18

Power of Attorney by vendor authorising purchaser's solicitor to execute conveyance or transfer (*a*)

(*Drafted by J. L. M. Bowyer, Barrister-at-Law*)

BY THIS POWER OF ATTORNEY I —— of —— appoint X of ——, Solicitor [and Y of ——, Solicitor, severally] (*b*) my attorney[s] (*b*) in my name and on my behalf to sign seal and deliver a conveyance [*or* transfer] already engrossed a copy whereof is set forth in the Schedule hereto AND I for myself and my successors in title ratify and agree to ratify anything that shall be done by the said X [or Y] (*b*) conformably with the purport of this Power

AND I declare that this Power shall be irrevocable for six months from the date hereof (*c*)

IN WITNESS, *etc.*

SCHEDULE

[Copy of conveyance or transfer]

(*a*) This precedent is intended only for the special purpose indicated in the article at p. 224, *ante*.

(*b*) If the Power were to disappear through the death, etc., of the donee, the purchaser would still be able to require the vendor, as his bare trustee, to execute the conveyance. The words in square brackets may, however, be included to provide against this contingency. They require no additional stamp. Finance Act, 1927, s. 56.

(*c*) See Law of Property Act, 1925, s. 127.

FORM 19

Quarrying Agreement (*a*)

(Drafted by D. J. Sarginson & Co., Solicitors, Stowmarket, Suffolk)

AN AGREEMENT made the —— day of —— 19— BETWEEN AB Ltd. of *etc.* (hereinafter called "AB Ltd." which term shall include their successors and assigns) of the one part and

(*a*) The present Agreement was drafted with the following main objects:

Section 180 (2) of the Mines and Quarries Act, 1954, reads: "In this Act the expression 'quarry' means an excavation or system of excavations made for the purpose of, or in connection with, the getting of minerals (whether in their natural state or in solution or suspension) or products of minerals, being neither a mine nor merely a well or bore-hole or a well and bore-hole combined." It follows that sand pits, wet or dry, are now "quarries," and the agreement can be employed in the sand and gravel industry as well as the limestone, etc.

(1) To enable a quarry owner to have his quarry worked for him by a contractor.

(2) To relieve the quarry owner of the heavy burden of duties and obligations, financial and otherwise, imposed on quarry "owners" by the Mines and Quarries Act, 1954.

(3) To enable the quarry owner himself to receive the benefit of wear and tear tax allowances on plant and machinery as against the contractor.

At first sight the Agreement, which is one of several now operating satisfactorily, may appear to impose an unreasonable burden on the contractor, so unreasonable, in fact, that it might seem that no contractor would consent to be party to it. In the draftsman's experience, this conclusion is not supported by fact. The majority of quarries in this country are managed by salaried managers and a quarry manager worth his salary as an employee is the right man to enter into such an agreement. If the contractor is a private limited company the manager should be required to guarantee the agreement. In the draftsman's experience, the effect of the agreement has always been to make the quarry owner better off and greatly to improve the efficient operation of the quarry.

This agreement, as drafted, can be employed for the majority of quarries, but it cannot be too strongly emphasised that a sound working knowledge of quarrying generally and a study of the quarry in question are essential to the preparation of the agreement. It is fair to say that to the majority of quarry owners and managers, phraseology is a matter of little or no concern; unless the draftsman can go through the agreement

CD of *etc.* (hereinafter called "the Contractor" which term shall where the context admits include his Executors and Administrators and Assigns) of the other part

WHEREBY it is agreed that AB Ltd. shall employ the Contractor as an independent contractor to occupy, take possession of and work, and the Contractor shall occupy, take possession of and work on behalf of AB Ltd.

ALL THAT PROPERTY known as —— Quarry, in the parish of —— in the County of —— (hereinafter called "the said Quarry") together with all buildings, structures, engines, machinery and plant held therewith or found thereon, as the site thereof is delineated (by way of identification only) on the plan attached hereto and is thereon coloured pink

UPON AND SUBJECT TO the following terms and conditions

1. This Agreement is not and shall not be deemed to be a demise or letting, or agreement to demise or let the said Quarry, buildings, structures, engines, machinery or plant, and shall not create any estate or interest therein in the Contractor other than a permissive licence to occupy and use the same

2. During the currency of this Agreement the Contractor shall be wholly and solely entitled to occupy, use and work the said Quarry, buildings, structures, engines, machinery and plant on behalf of AB Ltd., and AB Ltd. shall not during the continuance thereof occupy or work the said Quarry or permit any person other than the Contractor to occupy or work the said Quarry

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clause by clause and help both owners and managers to understand it, neither party will care much for it. In preparing these agreements, and mindful of the need successfully to marry the legal aspect of quarrying with the strictly practical, advantageous use may be made of the services of a firm of quarry consultants.

These Quarry Agreements may be contrasted with mining leases. The first difference is that the Agreement is not a lease. In order to avoid Bond Covenant duty there is no minimum output clause; the quarry owner relies on his rights contained in the agreement to determine it. The Agreement, under seal, has been adjudicated at 10s. stamp duty. A mining lease, to be of real value to the lessor, will contain provisions for rent plus royalty—usually the rent is high and contains a minimum royalty—and will be adjudicated for stamp duty purposes accordingly.

3. This Agreement shall apply, in all its terms and wherever the context permits, as well to any buildings, structures, engines, machinery or plant brought to or placed on the said Quarry during the currency of this Agreement as to such as may be held therewith or found thereon at the commencement of this Agreement

The Contractor agrees

4. At all times during the continuance of this Agreement diligently to carry on the business of production and manufacture of limestone and products derived therefrom

5. At all times during the continuance of this Agreement to work, carry on and manage his quarrying operations in the said Quarry, and delve and work the veins and beds to their proper depths, in all respects according to good quarrying practice

6. To use the said Quarry only for the purposes of the said business of the production and manufacture of limestone and products derived therefrom

7. To deliver to or to the order of AB Ltd. all the produce of the said Quarry, in such manner as AB Ltd. may from time to time direct

8. To keep all weighing machines at the said Quarry in proper balance and repair

9. To tare immediately prior to loading all vehicles used for the purpose of carrying away the produce of the said Quarry and without prejudice to the generality of the foregoing to tare on entry all vehicles entering the said Quarry for the purpose of carrying away the produce of the said Quarry

10. To cause all limestone and products derived therefrom to be brought to and weighed on one of the said weighing machines prior to leaving the said Quarry

11. To comply at all times with the conditions laid down by the local Planning Authority or other competent authority, under the Town and Country Planning Act 1947 or any other enactment or regulation, relating to the development of the said Quarry

12. At all proper times to apply for and do all acts and things necessary and proper to procure the regular renewal of all licences belonging or appertaining to the said Quarry or any part thereof, or necessary for the proper and efficient working of the same

13. At all times to employ skilful and careful managers, officials, supervisors, workmen and servants in and about the working of the said Quarry

14. To ensure at all times that all buildings, structures, engines, machinery and plant (whether supplied by AB Ltd. or not) are safe and free from any defect which might cause injury to any person

15. To erect and/or maintain in good and substantial repair and condition all necessary fencing and gates around and against all shafts, pits, pounds, tramways, railways, roadways and surface works to be made, formed, opened and worked, so as to protect and secure them against all loss or injury to human beings or to sheep, cattle or other animals, or to vehicles

16. To construct and maintain all such ditches, trenches and drains as may be necessary for conveying water from off the quarry lands, and to take all proper and necessary steps to avoid the pollution of any river or stream

17. Not to alter or remove any part of the said buildings, structures, engines, machinery or plant without the consent of AB Ltd., save in so far as the said alteration or removal is necessary for the performance of the Contractor's obligations under paragraphs 14, 15, 18, 19 or 20 hereof

18. To put and keep all buildings, structures, pits, shafts, roadways, ditches, fences, drains and watercourses (excluding machinery, engines and plant) in good and substantial repair and condition and to leave them in such repair and condition at the termination of this Agreement

19. To put and maintain and keep all machinery, engines and plant in good and substantial and safe repair and running condition, and to leave the same in such repair and condition at the termination of this Agreement, provided that the Contractor shall not at the termination hereof be liable for such

depreciation in value of the machinery, engines and plant as is due solely to fair wear and tear

20.—(a) To observe and comply with, in and about the occupation and working of the said Quarry and in all operations ancillary thereto and in the erection and working of all buildings, structures, engines, machinery and plant, all statutes, statutory rules, regulations and provisions for the time being relating thereto;

(b) Without prejudice to the generality of the foregoing to comply with all requests and directions of any Inspector appointed under part XI of the Mines and Quarries Act 1954 and forthwith to notify AB Ltd. in writing of any such request or direction

21. To be solely liable for and to indemnify AB Ltd. against any liability, loss, claim, costs or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever or injury or damage to any property real or personal, caused by or arising out of or in connection with the ownership, occupation or working of the said Quarry or the breach of any term of this Agreement, whether or not the same be due to the negligence of any person whatsoever

22. Without prejudice to the foregoing indemnity, to effect and keep in force at all times a policy or policies of insurance indemnifying the Contractor and AB Ltd. jointly and severally against all claims in respect of personal injury to or the death of any person whomsoever or injury or damage to any property real or personal of any Third Party caused by or arising out of or in connection with the ownership, occupation or working of the said Quarry to the minimum amount of £—— for any one claim and to pay the premiums thereon

23. To insure with insurers nominated by AB Ltd. in the joint names of AB Ltd. and the Contractor the said buildings, structures, engines, machinery and plant against loss or damage by fire or explosion to the full value thereof and against such other risks as AB Ltd. shall from time to time reasonably require

24. To pay all charges for electricity, water, telephone and outgoings whatsoever (except land tax and landlord's property tax unless occasioned by additions made by the Contractor to the existing buildings, structures, engines, machinery and plant) which shall hereafter become payable in respect of the said Quarry

25. To pay all increases in rates and taxes occasioned by any additions made by the Contractor to the existing buildings, structures, engines, machinery and plant

26. Not at any time during the continuance of this Agreement to assign or attempt to assign the benefit of this Agreement or any part thereof, or to sub-contract or attempt to sub-contract the obligations herein undertaken by the Contractor or any of them, or to part with the possession of the said Quarry, buildings, structures, engines, machinery or plant, or any part thereof

27. To permit AB Ltd., their servants or agents at all reasonable times to enter upon the said premises for the purposes:

(a) Of inspecting, surveying, measuring and ascertaining the quantity of stone which has from time to time been worked and gotten, and the manner of working and getting such stone; and

(b) Of ascertaining whether the Contractor is in all respects complying with the undertakings and obligations herein contained

28. Forthwith to assign to AB Ltd. any rights to work any minerals which may be obtained by the Contractor through or by reason of or in the course of his occupancy or working of the said Quarry, and to require as a term of the contract of any person employed by the Contractor that such person shall forthwith assign to the Contractor any such right as aforesaid

AB Ltd. agree

29. To remunerate the Contractor for all limestone produced by the Contractor from the said Quarry and delivered to AB Ltd. under this Agreement The rate of remuneration in respect of limestone shall be such as is contained in a current Schedule

of Rates annexed hereto and forming part of this Agreement The said Schedule may be varied from time to time by agreement between the parties hereto, whereupon the new Schedule as agreed shall become annexed to this Agreement and shall be deemed to form a part thereof, in substitution for the current Schedule

30. To pay for all material delivered to them as aforesaid on or before the 25th day of the calendar month following that in which such material was delivered

31. To pay all rates and property owners' tax (except in respect of such increases as may be occasioned by additions made by the Contractor to the existing buildings, structures, engines, machinery and plant)

32. At the determination of this Agreement, to accept at a valuation all the raw materials, manufactured stock and other stock-in-trade in and upon the said Quarry, the said valuation to be made by a person to be mutually agreed between the parties

PROVIDED THAT, AND IT IS HEREBY AGREED BETWEEN THE PARTIES HERETO

33. Without prejudice to the generality of Clause 20 hereof, or to any other provision or obligation herein contained, the Contractor shall be deemed to be the owner of the said Quarry for the purposes of the Mines and Quarries Act 1954, to the exclusion of AB Ltd.

34. AB Ltd. may summarily determine this Agreement and enter upon and take possession of the said Quarry, and the Contractor shall in the event of such determination peaceably deliver up the same, if there shall at any time be any breach of the Contractor's undertakings and obligations herein contained, or in the event of the Contractor committing any act of bankruptcy or having a receiving order made against him or making a composition with his creditors, or going into liquidation

35. This Agreement may be terminated by either party by giving to the other party three calendar months' notice in writing, which notice may be given at any time

36.—(a) The Contractor may, having first notified AB Ltd. of his intention and received their consent in writing, at his own expense, build or instal all such additional buildings, structures, engines, machinery and plant as may appear to him to be necessary or desirable for the carrying on of the said business

(b) At the determination of this Agreement AB Ltd. shall have the option of purchasing at a valuation all such additions as aforesaid, and if AB Ltd. do not exercise the said option within one month of the said determination the Contractor shall be entitled to remove all such additions as aforesaid, provided that the said removal can be carried out without causing damage to the property, machinery or plant of AB Ltd.

37. The Contractor shall not be entitled to any rights in and about the said Quarry, by reason of local custom or otherwise, save and so far as the same are conferred expressly by this Agreement

In witness, *etc.*

The Schedule of Rates before referred to

(1) The rate of remuneration shall be —— shillings for every ton of limestone delivered to AB Ltd. in accordance with the terms of this Agreement

(2) [*Provisions for minimum guaranteed remuneration if required*] (*b*)

(*b*) For the stamp duty disadvantages of including such provisions see footnote (*a*).

FORM 20

Agreement for sale by a Parish Council of a Building Plot adjacent to land which is retained (*a*)

(*Drafted by S. C. Barker, Solicitor*)

THIS AGREEMENT is made the —— day of —— 19— BETWEEN AB of *etc.* and CD of *etc.* (hereinafter called "the Vendors") of the one part and EF of *etc.* (hereinafter called "the Purchaser") of the other part

WHEREAS the Vendors are the two duly authorised members of a Committee of Management of the —— Parish Hall having management and control of freehold land at —— in the Parish of —— in the County of —— whereof the freehold land hereinafter agreed to be sold forms part (as the whole is hereinafter referred to as "the Trust Premises") pursuant to a Declaration of Trust expressed to be made by the —— Parish Council dated the —— day of —— 19— in favour of the said Committee of Management and in further pursuance whereof by order of the Charity Commissioners for England and Wales (sealed the —— day of —— 19—) the Trust Premises were vested in the Official Trustee of Charity Lands

AND WHEREAS the doubts which arose consequent upon the decision in the case of *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C. 572 as to whether or not the Trusts of the said Declaration of Trust are in fact charitable and that therefore the Official Trustee of Charity Lands might be deemed not to have the Trust Premises vested in him have now been resolved by the Recreational Charities Act 1958 which received the Royal Assent on March 13 1958

AND WHEREAS the freehold land specified in the First Schedule hereto (hereinafter called "the said property") is not now required for the purposes of the said Committee of Management and the Vendors have agreed with the Purchaser

(*a*) This Agreement deals with the problem presented by the doubt as to whether recreational trusts were charitable, and its solution by the Recreational Charities Act, 1958.

conditionally as hereinafter mentioned for the sale thereof to the Purchaser at the price of £——

NOW THIS AGREEMENT WITNESSETH as follows:

1. THE Vendors shall sell and the Purchaser shall purchase the said property at the price aforesaid conditional upon:

(a) The Order of the Minister of Education sanctioning this sale and the approval and/or concurrence in the Conveyance as hereinafter mentioned of the Official Trustee of Charity Lands and

(b) The approval by Resolution of a majority of the Committee of Management constituted by the said Declaration of Trust of the —— day of —— 19— evidence of which shall be supplied to the Purchaser

(c) The Concurrence in the Conveyance of two duly authorised persons on behalf of the —— Parish Council

2. THE sum of £—— having been paid on or before the signing hereof to The Secretary of the —— Parish Hall Committee by way of a deposit and in part payment of the purchase price the purchase shall be completed and the balance of the purchase money paid at the office at *etc.* the Vendors' Solicitors on the —— day of —— 19—

3. THE Vendors contract as members of the said Committee of Management

4. THE title shall commence with —— and the purchaser shall not require evidence concerning any matter prior thereto

5. THE Purchaser shall not require execution of the Deed of Conveyance of the said property by the Official Trustee of Charity Lands as it is not the practice of his Department to execute any such Conveyances Further the Purchaser shall accept as properly executed the execution of the said Deed of Conveyance for the —— Parish Council by two of the Council members duly authorised Further the Purchaser shall accept as properly executed the execution of the said Deed of Conveyance for and on behalf of the said Committee of Management by the Vendors as its duly authorised representatives The Purchaser shall not be entitled to require the concurrence of any further or other parties to the Deed of Conveyance to the Purchaser and

shall be bound to accept all or any of such parties as having power conclusively to convey the unincumbered legal estate in fee simple of the said property

6. THERE is excepted and reserved from the sale

(a) All mines metals oils shale stone and minerals including moulding sand china clay stone and all powers of working same

(b) To the Vendors and their successors in title of the immediately adjacent retained portion of the Trust Premises (as such retained portion is edged —— on the plan hereinafter referred to) the right of light to the windows of any building or buildings erected or to be erected on such retained land notwithstanding that the same may result in diminution of light or air to the said property hereby agreed to be sold

7. THE said property is sold and will be conveyed subject

(a) To the stipulations and restrictions contained in the Second Schedule hereto and the Conveyance to the Purchaser shall contain a covenant by the Purchaser for himself and his successors in title with the Vendors (and other the conveying parties as requisite of the land hereby agreed to be sold) and their successors in title of the said retained land to perform and observe the same and such covenants shall be so framed that the burden shall run with and be binding upon the said property hereby agreed to be sold

(b) To all land tax tithe rentcharge or tithe redemption annuity and the Purchaser shall be responsible for payment of any road paving and drainage charges

8. THE Vendors shall in the said Conveyance covenant with the Purchaser that they the Vendors will at their own expense ballast and gravel the road coloured —— on the plan hereto annexed within six months of the date hereof the Purchaser thereafter contributing one equal half of the cost of maintaining jointly with the owner of the adjoining Plot No. —— on the said plan in accordance with Clause —— of the Second Schedule hereto and the Vendors shall by completion at their own cost divert the water main from the present line shown on the plan hereto annexed to the line delineated in —— on the said plan but the Vendors will not accept responsibility as to the provision of any other services or for laying out of the same

9. The said property is sold on the footing that the use thereof for the purpose of the Town and Country Planning Act 1947 is residential

10. The form of Conveyance shall be subject to the approval (if deemed requisite by the Vendors) by the Official Trustee of Charity Lands

11. The respective Purchasers of the plots respectively numbered —— and —— in the said plan shall at their own risk make connections and lay their water services from stop cocks by main sited to the approval of the Vendors' Architects to their respective plots before the road tinted —— on the said plan is surfaced by the Vendors

12. The respective purchasers of the plots respectively numbered —— and —— and —— in the said plan shall be at liberty to connect at their own risk to head of sewer at point S on the said plan subject to the approval of the Vendors' Architects to the reinstatement of the road surface

13. Vacant possession of the said land will be given to the Purchaser on completion of the purchase

14. The said property is sold subject to the National Conditions of Sale 16th Edition so far as the same are not inconsistent with these Conditions and are applicable to a sale by private treaty

As witness the hands of the parties hereto the day and year first above written

The First Schedule above referred to

All that piece or parcel of land situate at —— in the said Parish of —— being plot number —— edged —— on the plan hereto annexed by way of identification only and not of limitation and being part of the Number —— and —— in the Ordnance Survey Map Plots Numbers —— and —— of that Parish together with the right of the Purchaser in common with the owners of building plots Numbered —— and —— and their licensees at their own risk to pass and repass at all times with or without motor-cars or other vehicles over the roadway coloured —— and —— on the said plan

THE SECOND SCHEDULE ABOVE REFERRED TO

Note There are four building plots in this particular building estate Numbered —— —— —— and —— on the said plan and the Vendors' retained land thereon edged ——

1. In order to preserve the uniformity of the frontages each of the Purchasers of plots numbered —— and —— shall observe the building line which is at a distance of —— feet from the road tinted —— on the said plan nor less than —— feet to the County Council improvement line which forms the —— boundaries as on the said plan

2. Each Purchaser shall within six months from the date of his Contract of Purchase erect and forever thereafter maintain good and sufficient post and wire boundary fences between not less than —— feet —— inches and —— feet —— inches high such fences to be covered by the planting of evergreen hedges which shall not be more than —— feet in height along the sides of his plot and along that side of his plot which is marked inside the boundary with a "T" If any question as to the liability to fence shall arise the same shall be decided by the Vendors' Architects

3. Not more than one messuage of minimum cost of Two thousand pounds shall be erected on any one of each of the said plots Numbered —— —— —— and —— on the said plan and no messuage shall be used for any purpose other than as one private dwelling-house or the professional residence of a solicitor architect medical practitioner or dentist

4. No dwelling-house or messuage as aforesaid shall be erected otherwise than in accordance with plans and elevations and of a design and of materials previously approved by the Vendors' Architect and no building shall be commenced on any plot until such Architect shall give approval in writing For every such approval the Purchaser of the plot in respect of which the same is given shall pay to the Vendors' Architects the sum of Three guineas

5.—(a) Each of the Purchasers of the respective plots numbered —— and —— shall contribute one equal half share of cost of maintaining the road forming part access from the

main road (as the same is tinted —— on the said plan) with the owner for the time being of the other plot

(b) Each of the Purchasers of the respective plots numbered —— and —— shall contribute one equal half share of the cost of maintaining the road forming part access from the main road (as such part access is tinted —— on the said plan) with the owner for the time being of the other plot

6. Every Purchaser shall have the right to lay and maintain such pipes wires or other apparatus as shall be required making good the surface of any part of the road tinted —— and —— at his own risk for gas and electricity

7. All mines and minerals of every description under the said property with full power to win work and carry away the same were by a previous Conveyance of the property reserved in favour of —— in a Conveyance dated the —— day of —— 19— and made between *etc.* with a provision for compensation as in the said Conveyance mentioned.

FORM 21

Settlement of investments on present and future children of the Settlor designed to save estate duty, income tax and surtax (*a*)

(*Drafted by E. H. Bodkin, Esq., of Lincoln's Inn*)

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the other part Parties.

(*a*) This Precedent is believed to be, in some respects, an improvement on Form 29 at p. 579 of Vol. 13 of the *Conveyancer*. The objects to be attained in settlements of this nature are:

(1) to save estate duty being payable out of the Settlor's estate if he dies after the five years period;

(2) to avoid income or accumulated income being treated as the Settlor's income for purposes of income tax and surtax;

(3) to preserve the right to claim reliefs on accumulated income when the children attain vested interests; and

(4) to preserve the right of the Settlor to claim children's reliefs.

It is probably safer, having regard to the views which have been expressed as to the liability for estate duty under an accumulation clause under which the period of accumulation is limited by reference to the Settlor's life, to avoid such a clause, though it is submitted that duty would only be payable under section 2 (1) (d) of the Finance Act, 1894, on the value of the interest in the income accruing to the child. The only liability to income tax and surtax incurred by omitting such a clause would (under section 397 of the Finance Act, 1952) be in respect of the tax for the financial year at the commencement of which the child was an infant and unmarried, provided the vesting is postponed until April 5 next after the child attains twenty-one or marries or the statutory concession applies. This liability can be avoided as regards present children by making any income not accumulated payable to the other children or the ultimate beneficiary. In any case if no income were actually paid or applied in that year probably the Settlor would not be charged with tax. As regards future children, it is probably better to rely on the concession at present in force whereby accumulations of income are not treated as the Settlor's income if the shares vest at twenty-one or marriage, rather than to settle their shares. The reliefs to which the children are entitled on accumulated income can, on their attaining a vested interest, be recovered under section 228 of the Income Tax Act, 1952, if their interests depend on the contingency of attaining a specified age or marriage, and probably

Recitals:

WHEREAS:

Transfer of investments;

(1) The Settlor is absolutely entitled to the investments specified in the Schedule hereto and with a view to the Settlement hereinafter contained has transferred the same to the Trustees to be held by them upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same

Settlor's present children.

(2) The Settlor has three children and no more *viz.* ——, —— and —— (infants who were born on the —— day of —— 19— the —— day of —— 19— and the —— day of —— 19— respectively and are hereinafter called "the Present Children" and each of whom is hereinafter referred to as "a Present Child")

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows:

Trust to sell or retain investments.

1. THE Trustees shall stand possessed of the said investments specified in the said Schedule hereto [and of any other investments and cash hereafter transferred or paid by the Settlor to the Trustees and accepted by them as part of the trust property] UPON TRUST either to allow the said investments to remain as now invested or at any time or times [with the consent of the Settlor during his life and after his death] at their discretion to sell the same or any of them and to invest the net proceeds of sale [and any cash] in or upon any of the investments hereinafter authorised with power [with the like consent or] at the like discretion to vary such investments for others of a nature hereby authorised

Trust for present children and future born children born within limited period.

2. THE Trustees shall stand possessed of the said investments [and cash] and the investments for the time being representing the same (hereinafter called "the Trust Fund")

(though this is not wholly free from doubt) when the contingency is only that of attaining a specified age. It is usually best to make the class of future children close on the eldest of the present children attaining a vested interest, as in the above Precedent.

The Settlement will not affect the Settlor's right to claim children's reliefs, as the children do not become absolutely entitled to their shares of income. But if an amount exceeding the statutory limit is applied for their maintenance, this will prevent the reliefs being claimed, as the amount so applied will become their income.

upon the trusts and with and subject to the powers and provisions following that is to say—

(1) UPON TRUST for the following persons and if more than one in equal shares that is to say All or any the Present Children who shall attain the age of twenty-two [twenty-five] years or marry before attaining that age but after April 5 next after he or she shall attain the age of twenty-one years and All or any the afterborn children or child of the Settlor by his present wife—who shall be born before the eldest of the Present Children shall attain or would if living have attained the age of twenty-two [twenty-five] years and who shall attain the age of twenty-one years or being female shall marry under that age (the afterborn children of the Settlor born within the period aforesaid being hereinafter referred to as "the Afterborn Children" and each of them as "an Afterborn Child")

(2) The trust aforesaid shall carry the intermediate income and the powers of maintenance and accumulation in section 31 of the Trustee Act 1925 shall not be excluded by anything herein contained in relation to the share of a Present Child during his or her infancy and to the share of an Afterborn Child and the power of maintenance aforesaid shall continue to apply to the share of a Present Child after he or she attains the age of twenty-one years until he or she attains a vested interest or dies [until April 5 next after he or she attains the age of twenty-one years (*b*)] but so that any income arising from such share and the accumulations of income thereof which is not paid or applied under the said power shall in lieu of being accumulated accrue and be added to the income of the shares of the other Present Children and Afterborn Children (including [other than] any share or shares which have been transferred to the person or persons entitled thereto) and if more than one in equal shares and so that the income so accruing shall be held Upon the trusts and with and subject

(*b*) The words in square brackets and subclause (3) may be inserted if desired when the shares of Present Children vest at twenty-five. In any case the whole income after April 5 next after the child attains twenty-one or marries could safely be applied for maintenance.

to the powers and provisions applicable to the income of such original share so far as circumstances permit PROVIDED that if any income shall accrue under this present provision to the income of the share of a Present Child who is over twenty-one years of age and the Trustees shall determine not to apply the said income for his or her benefit under the said power of maintenance the said income shall be paid to the person or persons who are for the time being presumptively entitled to the capital of the Trust Fund under sub-clause (6) of this clause and if more than one in equal shares (*c*)

[(3) Subject as aforesaid the income of the share and of the accumulation of income thereof to which a Present Child is for the time being contingently entitled shall be paid to him or her but not so as to vest the capital] (*d*)

Power of advancement.

(4) The statutory power of advancement shall apply to the share of a Present Child and an Afterborn Child (*e*)

Provisions as to income when no children are in existence.

(5) During any period during which there shall be no person in existence to or for whose benefit any income of the Trust Fund is payable or applicable under the trusts hereinbefore declared concerning the shares of the Present Children and the Afterborn Children such income shall be paid to the person or persons who are for the time being presumptively entitled to the capital of the Trust Fund under sub-clause (6) of this clause and if more than one in equal shares

Ultimate Trust.

(6) Subject to the trusts hereinbefore declared and to any exercise of the powers hereby or by law conferred on the Trustees the capital and income of the Trust Fund shall be held IN TRUST for D absolutely (*f*)

Power to declare new trusts.

3. THE trustees hereof for the time being (not being less than two in number) may at any time or times before the

(*c*) The proviso is intended to cover the possibility of two of the present children being between the ages of twenty-one and twenty-two [twenty-five] at the same time.

(*d*) *Cf. Re King* [1928] Ch. 330. This subclause will provide for the payment of the income as well after as before the child attains a vested interest, until the class closes.

(*e*) As to income tax on advances, see section 398 (2) of the Income Tax Act, 1952.

(*f*) This should be someone other than the Settlor or any wife of his.

Trust Fund has absolutely vested in any person or persons by deed or deed revocable or irrevocable revoke the trusts hereinbefore declared and in lieu thereof appoint such other trusts for the benefit of all or any of the Present Children and the Afterborn Children their spouses and issue or any of such persons as they in their absolute and uncontrolled discretion think fit but without infringing the rule against perpetuities and so that in no circumstances whatsoever shall any part of the capital or income of the Trust Fund be payable or applicable to or for the benefit of the Settlor or any woman to whom he is or shall have been married whether under the trusts or powers so appointed or under any resulting trust or otherwise howsoever

Power to insure against death duties.

[4. THE Trustees may effect any policy or policies of insurance (whether on the Settlor's life or otherwise) in such form and for such amount as they think fit to provide for the duty which may become payable in respect of the Trust Fund in the event of the Settlor's death within five years of the date hereof and may pay the annual premiums out of the income of the Trust Fund or (if the policy or policies are effected for a single premium) out of the capital of the Trust Fund and shall apply the moneys received in respect of such policy or policies in paying such duty and subject to such application shall hold such moneys or so much thereof as shall not be required to be so applied as an accretion to the Capital of the Trust Fund] (*g*)

Power of investment.

[5.—(1) Money subject to the trusts hereof may be invested in or upon

(i) The Public Stocks Funds or Government Securities of the United Kingdom or any British State

(ii) Securities the interest on which is guaranteed by Parliament

(iii) Metropolitan or London County Stock or the stocks bonds debentures or other securities of any Municipality County or District Council public body or local authority in the United Kingdom

(*g*) Alternatively the Settlor may covenant with the Trustees to pay the duty or provide for it by his will.

(iv) The bonds debentures debenture or rentcharge stock mortgages obligations or securities or the guaranteed preference or ordinary stock or shares or other marketable securities which are quoted on the Stock Exchange and do not carry any liability for calls of any company public or private (wherever carrying on business) incorporated by Special Act or under any Public General Act or Acts of the Imperial Parliament or the legislature of any British State or by Royal Charter

(v) The security of any interest for life or vested or contingent interest in real or personal property in the United Kingdom together with a policy of assurance on the life or against the contingency

(vi) Freehold or leasehold securities in England or Wales (whether or not by registered charge under the Land Registration Act 1925) together in the case of leaseholds having less than sixty years to run at the date of such investment with a sinking fund policy for securing a sum not less than 20 per cent. larger than the sum lent

(vii) The purchase (including the purchase as a residence for the Present Children or the Afterborn Children or any of them) of freehold ground rents or other landed property in England or Wales of any tenure but leaseholds only if at least sixty years of the term on which the same are held is unexpired

(viii) The shares or deposits of any permanent Building Society registered in the United Kingdom

(2) For the purposes of this clause the expression "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland and "British State" shall mean any colony dominion commonwealth union or dependency forming part of the British Empire or Commonwealth of Nations or any province or State having a local legislature and forming part thereof respectively but not the Irish Free State

Powers of Trustees: To improve land, etc.;

6. The Trustees may raise and apply trust money in (i) making improvements upon any land subject to the trusts hereof or in erecting repairing making structural alterations in or pulling down and rebuilding buildings or other erections

thereon (ii) complying with the requirements of any order or direction for the provision of fixed equipment under the Agriculture Act 1947 or any statutory modification or re-enactment thereof (iii) payment of the costs of and incidental to obtaining permission for development of or payment of compensation in respect of any land subject to the trusts hereof pursuant to any Act relating to planning control or opposing or making objections or representations in regard to any proposed order or prosecuting an appeal therefrom and all compensation shall (subject to the Trustees' discretion under clause 9) be capital

To make arrangements on reconstruction of companies and to vary securities;

7. THE Trustees shall have power (1) to make such arrangements upon the reconstruction of any company in which they hold stocks shares or securities as if they were the absolute owners of such stocks shares or securities (2) to release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all moneys remaining due thereon and to vary the terms of any such security

To act on opinion of counsel;

8. THE Trustees shall not be personally liable for breach of trust or otherwise if they act upon the opinion of counsel of not less than ten years' standing as to what moneys are to be considered capital or income and whether any expenses outgoings or other payments ought to be paid out of capital or income or as to any other questions or matters of doubt arising in the execution of the trusts hereof

To appropriate.

9. THE Trustees may exercise the powers of appropriation conferred by section 41 of the Administration of Estates Act 1925 without any of the consents requisite for the exercise of such powers by personal representatives

Charging clause.

10. ANY trustee (other than the Settlor or any woman to whom he is or shall have been married) being a solicitor or other person engaged in any profession or business shall be entitled to be paid all usual professional or proper charges for business transacted time expended and acts done by him or any partner of his in connection with the trusts hereof including acts which a trustee not being in any profession or business could have done personally

Power for trustee directors to retain remuneration.

[11. ANY trustee for the time being hereof who shall be or become a director of or who shall at any time hold any remunerated office in relation to any Company of which (or of any other company or companies controlling which) any shares or stock carrying any voting rights are for the time being comprised in the Trust Fund shall be entitled to receive and retain for his own use and benefit all remuneration and other similar benefits received by him from or through any such company and shall not be liable to account therefor whether or not any such voting rights may have been used either by voting or refraining from voting for the purpose of enabling such trustee to obtain or retain any such directorship or other remunerated office]

Power to appoint new trustees.

12. THE power of appointing a new trustee or new trustees of this Settlement shall be vested in the Settlor during his life

IN WITNESS, *etc.*

THE SCHEDULE ABOVE REFERRED TO

[*This will contain particulars of the investments*]

FORM 22

Deed of Appropriation under the statutory power in satisfaction of an annuity, a settled share of residue, and the interests of residuary legatees, one of whom is an infant (*a*)

(*Drafted by E. H. Bodkin, Esq., of Lincoln's Inn*)

Parties.

THIS DEED OF APPROPRIATION is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Executors") of the first part C of *etc.* (hereinafter called "the Annuitant") of the second part D of *etc.* of the third part and E of *etc.* of the fourth part

Recitals: Will of Testator;

WHEREAS:

(1) X late of —— in the County of —— (hereinafter called "the Testator") by his Will dated the —— day of —— 19— after appointing the Executors to be the executors and trustees thereof and bequeathing certain pecuniary legacies and giving an annuity of £—— to the Annuitant during his life devised and bequeathed all his real estate and the residue of his personal estate to the Executors UPON TRUST to sell and convert the same with power to postpone sale as therein mentioned and out of the net proceeds of sale and his ready money to pay his funeral and testamentary expenses death duties and debts and the legacies thereby bequeathed and to invest the residue of the said moneys as therein mentioned and to stand possessed of the said proceeds of sale and the investments for the time being representing the same (thereinafter and hereinafter called "the residuary estate") UPON TRUST to pay the income of one moiety thereof to the Widow during her life and subject thereto to hold the residuary estate UPON TRUST for all or any his children or child living at his death who attained the age of

(*a*) It is assumed that the statutory power is not varied by the will so as to make the consents required by section 41 of the Administration of Estates Act, 1925, unnecessary, and that the will contains no express power of appropriation in regard to the annuity. The stamp duty must be adjudicated.

twenty-one years or being female married under that age and if more than one in equal shares

Death and probate; (2) The Testator died on the —— day of —— 19— without having revoked or altered his said Will which was on the —— day of —— 19— duly proved and registered in the —— Probate Registry by the Executors

Surviving children; (3) The Testator left him surviving three children and no more *viz.* the said D and E and F (who is an infant of the age of —— years) and no legally adopted children

Administration of estate; (4) The funeral and testamentary expenses and debts of the Testator and the duties which became payable on his death and the pecuniary legacies bequeathed by his said Will have been paid

Advances; (5) The Executors have advanced to the said D and E out of their shares in the residuary estate the sums of £—— and £—— respectively

Residuary estate; (6) The residuary estate (after setting aside a sum of £—— to answer the costs of and incidental to the appropriation hereby effected) now consists of the freehold properties investments and cash mentioned in the First Schedule hereto and the Executors are desirous in exercise of the power in that behalf conferred by section 41 of the Administration of Estates Act 1925 and with the consents hereinafter given of appropriating the same in manner hereinafter appearing

Valuation. (7) The said freehold properties have been valued for the purposes hereof by Messrs. —— at the amounts respectively set against them in the said First Schedule and the amounts therein set against the investments are the mesne market price at the date hereof

NOW THIS DEED WITNESSETH as follows:

Appropriation. 1. THE Executors in exercise of the said statutory power and of every other power them enabling hereby

(1) With the consent (hereby testified) of the Annuitant appropriate the investments mentioned in the First Part of the Second Schedule hereto in satisfaction by the income thereof of the said annuity

(2) With the consent (hereby testified) of the Widow appropriate to the moiety of the residuary estate in which she has a life interest the freehold properties and investments mentioned in the Second Part of the said Second Schedule

(3) With the consents (hereby testified) of the said D and E respectively appropriate the freehold properties investments and cash mentioned in the Third and Fourth Parts of the said Second Schedule hereto respectively to the shares of the said D and E in the remaining moiety of the residuary estate after bringing into account the said sums of £—— and £—— so advanced to them respectively

(4) With the consent (hereby testified) of the Widow on behalf of the said F appropriate the freehold properties mentioned in the Fifth Part of the Second Schedule to the share of the said F in the last mentioned moiety of the residuary estate

Declaration of Trust.

2. THE Executors shall make all such assents transfers and payments as shall be necessary or proper for vesting in the said D and E the said freehold properties investments and cash appropriated to their shares and shall assent to the vesting of the said freehold properties appropriated to the share of the said F in themselves on trust for sale (*b*) and until such assents transfers and payments shall have been made shall hold the said freehold properties investments and cash in trust for the persons in whose favour or for whose benefit such assents transfers and payments ought to be made

Further assents, etc.

3. THE Executors shall make all such further assents conveyances and transfers as may become necessary on the deaths of the Annuitant and the Widow

Release of executors.

4. THE said D and E do and each of them doth release the Executors and each of them and their respective personal representatives from the property hereby appropriated to their respective interests in the residuary estate and from all actions proceedings costs charges claims and demands in respect thereof or of anything done or omitted by the Executors or either

(*b*) See Administration of Estates Act, 1925, s. 41 (6) (8). For form of Assent, see next Precedent.

of them in relation thereto but this release shall not take effect until the said property shall have been duly transferred or paid to them respectively

IN WITNESS, *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO

[*This will contain particulars of the residuary estate and show the values attributed to the freeholds and investments*]

THE SECOND SCHEDULE ABOVE REFERRED TO

Part I

[Investments appropriated to the annuity]

Part II

[Freehold properties and investments appropriated to the moiety in which the Widow has a life interest]

Part III

[Investments freehold properties and cash appropriated to D's share]

Part IV

[Investments freehold properties and cash appropriated to E's share]

Part V

[Freehold properties appropriated to F's share]

FORM 23

Assent by executors to the vesting in themselves on trust for sale of freehold property appropriated to the share of an infant in the proceeds of sale of residuary realty

(*Drafted by E. H. Bodkin, Esq., of Lincoln's Inn*)

WE A of *etc.* and B of *etc.* AS PERSONAL REPRESENTATIVES of X late of —— in the County of —— who died on the —— day of —— 19— (being at his death estate owner in respect of the fee simple in the property mentioned in the Schedule hereto for his own use and benefit absolutely) and whose last will was duly proved and registered by us as the executors therein named on the —— day of —— 19— in the —— Probate Registry HEREBY ASSENT to the vesting in ourselves of ALL THOSE the freehold properties and rights mentioned in the said Schedule hereto in fee simple UPON TRUST to sell the same or any part thereof with power to postpone the sale And to stand possessed of the net proceeds of any such sale (after payment of costs) and of the net rents and profits of such part thereof as shall remain for the time being unsold (after payment of outgoings) UPON THE TRUSTS upon which the same ought to be held under the said Will or otherwise (*a*) AND declare that the statutory power to appoint new trustees applies to this Assent

AS WITNESS, *etc.*

THE SCHEDULE ABOVE REFERRED TO

[*This will contain particulars of the freehold property*]

(*a*) This appears to be the best form of trust. The Deed of Appropriation should not be referred to, and if an express trust for the infant is inserted, there is a possibility that a purchaser could raise the point that the Assent might have created a new settlement, and require the stamp to be adjudicated. See also note (*b*) to preceding Precedent as to the continuance of the trust for sale in the Will.

FORM 24

A "Table A" for settlements

(Drafted by Timothy Jones, Barrister-at-Law)

The Schedule Before Referred To (*a*)

Additional Trusts Powers and Provisions

Trust for sale and investment.

1. (A) The Trustees shall hold any real or immovable property comprised in the Trust Fund UPON TRUST to sell the same with power to postpone the sale thereof or of any part thereof for such period as they shall in their discretion think fit AND shall hold all other investments comprised in the Trust Fund UPON TRUST at their discretion either to retain the same in the existing state thereof for such period as they shall think fit or at their discretion to sell the same or any part thereof

(B) The Trustees shall hold the net proceeds of any sale of investments comprised in the Trust Fund and all other moneys held or received by them as capital money UPON TRUST to invest the same at their discretion in any investments of any nature hereby authorised

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(*a*) It is assumed that this will be added as a schedule to the settlement. The body of the settlement will contain the usual definitions of "the Settlor," "the Trustees" and "the Trust Fund" (the latter definition need not expressly refer to any further property to be added to the settlement, see para. 2 (C)). To incorporate the schedule a clause should be inserted in the settlement as follows: "The additional trusts powers and provisions contained in the Schedule hereto shall have effect in like manner as if set forth in this Clause and shall have effect in priority to the trusts powers and provisions herein otherwise contained except in so far as expressly modified thereby."

Any of the paragraphs of the schedule marked with an asterisk can be omitted without making consequential amendments elsewhere (save for renumbering the remaining paragraphs). In most other cases a paragraph can be omitted or modified with only minor consequential amendments.

If any paragraphs of the schedule have to be referred to in the body of the settlement the reference can be made to their marginal titles, instead of to their numbers: this will avoid possible errors if paragraphs are renumbered while the draft is being considered.

It should be noted that the provisions of the schedule prevail over those in the body of the settlement in the case of conflict. Thus if any clause of the settlement seeks to modify the schedule it should expressly refer to the schedule and to the paragraph to be modified.

(C) The Trustees shall have power to vary or transpose any investments so made for or into any others of any nature hereby authorised

Trust of additional property (*b*).

2.* (A) Any investments or capital moneys or income hereafter transferred or paid to the Trustees by or pursuant to the direction of the Settlor at any time before the whole of the Trust Fund has become indefeasibly vested in possession in some persons or person of full age shall in the absence of any contrary direction be held by the Trustees upon the trusts hereof (in the case of investments or capital moneys) as an accretion to the capital of the Trust Fund (including any share thereof already vested in possession) and as one fund with such capital for all purposes or (in the case of income) as part of the income of the Trust Fund (including any such share thereof as aforesaid)

(B) The foregoing sub-paragraph shall apply to any investments or capital moneys or income transferred or paid to the Trustees pursuant to any trust or direction or in exercise of any power contained or implied in any settlement will codicil or other disposition made by the Settlor in like manner as it applies to investments or capital moneys or income transferred or paid by or pursuant to the direction of the Settlor

(C) Where the context admits references herein to the Trust Fund or to the income thereof shall respectively include any investments or capital moneys which may become liable by virtue of this paragraph to be held as an accretion to the capital of the Trust Fund and the investments and capital moneys from time to time respecting the same and any income which may so become liable to be held as part of the income of the Trust Fund

Powers of investment.

3. (A) Moneys requiring investment hereunder may at the discretion of the Trustees be invested in the acquisition or upon the security of any investments of whatsoever nature and wheresoever situate (including the acquisition of any property whatsoever and wheresoever situate and whether movable or immovable) or upon personal credit or security to the intent that the Trustees shall have the same powers of investing such

(*b*) This paragraph is intended to reinforce and extend the inference drawn in *Re Curteis' Trusts* ((1872) L.R. 14 Eq. 217), and to enable further property to be added without the execution of a memorandum attracting *ad valorem* stamp duty.

moneys as if they were absolutely and beneficially entitled thereto

(B) The acquisition of any immovable property or chattels for residence therein or occupation or use and enjoyment *in specie* by any person interested in possession in the income of the moneys used on such acquisition (including a person to whom such income may be paid in exercise of the Trustees' discretion) shall be deemed to be an investment of such moneys

(C) The acquisition of any reversionary interest or any policy or securities or other investments not producing income or in respect of which no dividend interest or rent is payable shall be deemed to be an authorised investment of trust moneys

(D) The acquisition of any annuity or policy or securities or other investments being of a wasting nature shall be deemed to be an authorised investment of trust moneys

Provisions as to apportionments to capital and income.

4. (A) Where any such reversionary interest policy security or investment as is described in sub-paragraph (C) of the last foregoing paragraph of this Schedule is comprised in the Trust Fund or where any security comprised therein is sold with the right to receive the dividend or interest accrued or accruing thereon no part of any accretion to the value thereof or of any premium or bonus or other sum (whether in respect of arrears of or prospective dividend or interest or income or otherwise) which accrues or is payable when the same falls into possession or on the redemption or maturity thereof or on repayment of the capital moneys thereby secured or on the sale or disposal thereof shall be apportionable to or be treated as income

(B) Where any such annuity policy security or investment as is described in sub-paragraph (D) of the last foregoing paragraph of this Schedule is comprised in the Trust Fund no part of any income or of any other periodical sums received in respect thereof (whether or not by way of repayment of capital by instalments) shall be apportionable to or treated as capital

(C) The Trustees shall have power to make any such investment as is mentioned in the said sub-paragraphs (C) or (D) notwithstanding that the making thereof may affect or alter *inter se* the interests of the persons respectively interested in capital and income hereunder

Power to hold investments in the names of nominees.

5.* The Trustees shall have power to transfer any investments comprised in the Trust Fund (including securities payable to bearer) to any person (whether or not being one of the Trustees) in any part of the world with or without the right to receive the income thereof so as to be held by or in the name of or under the legal control of such person as nominee for the Trustees and may give directions to such person (in conformity with the other trusts powers and provisions hereof) as to any dealing therewith and as to the payment of the income thereof and in such case

(a) the person to whom the investments are so transferred shall not (unless he is one of the Trustees) be concerned with the trusts hereof or be responsible for any loss caused or breach of trust occasioned by any dealing with the same or any payment of the income thereof made at the direction of the Trustees whether he has notice of the trusts hereof or not

(b) the Trustees shall not be responsible for any default of such person or for any loss incurred in consequence of any exercise of the foregoing powers if exercised in good faith and shall be entitled to be allowed and paid all remuneration and expenses payable to or incurred by such person in connection with the holding of or any dealing with the said investments or the payment of the income thereof

Provisions as to land.

6.* Where the Trust Fund includes any real or immovable property or the prospective proceeds of sale of any real or immovable property

(a) The Trustees shall not be bound to see nor be liable or accountable for omitting or neglecting to see to the repair or insurance of any buildings or fixtures comprised in such property or to the payment of any outgoings in respect thereof

(b) The Trustees shall have power to expend capital money in erecting any buildings on such property or in demolishing and rebuilding or in making alterations or improvements to any buildings forming part of such property (including the provision and installation of fixtures whether by way of replacement of obsolete or worn-out fixtures or otherwise) or otherwise in making improvements to such property to such extent and in such manner as they shall in their discretion think fit and any

certificate in writing of any architect or surveyor employed by the Trustees to the effect that the work therein specified is or includes an alteration or an improvement shall be conclusive as between the Trustees and all persons interested hereunder that any capital money expended on such work was properly so expended in exercise of this power

Provisions as to chattels.

7.* Where the Trust Fund includes any chattels or the prospective proceeds of sale of any chattels

(a) The Trustees shall have power to lend or let or hire any of such chattels to any person (whether or not being a person interested hereunder) either gratuitously or for such consideration and upon such terms and for such period as the Trustees may in their discretion think fit (*c*)

(b) The Trustees shall not be bound to see nor be liable or accountable for omitting or neglecting to see to the repair or insurance of the chattels and where any chattels are lent let or hired to any other person or any other person is lawfully permitted to use and enjoy any chattels *in specie* the Trustees shall not be responsible for any loss incurred through any damage to the same caused by or through any sale or conversion thereof made by such person or otherwise incurred through any neglect or default of such person

Power to permit enjoyment of property *in specie*.

8. The Trustees shall have power to permit any person interested in possession in the income of any immovable property or chattels which or the prospective proceeds of sale of which are included in the Trust Fund or any person who would be so interested if the same were producing income or any person to whom such income might be paid in exercise of the Trustees' discretion to reside in or occupy or use and enjoy *in specie* such immovable property or chattels either rent-free or otherwise and upon such terms and for such period as the Trustees may in their discretion think fit

Power of appropriation.

9.* The Trustees shall have power to appropriate any part of the Trust Fund in its existing state in or towards satisfaction of

(*c*) This sub-paragraph is only necessary where the settled property is likely to include chattels of artistic or historical interest: in such a case it is useful to have a power to lend the chattels, *e.g.*, to a museum, on terms of the latter preserving and insuring them. If sub-paragraph (a) is omitted, the words "any chattels are lent let or hired to any other person or" should be omitted from sub-paragraph (b).

any share of the Trust Fund to which any person is actually or contingently entitled (whether or not subject to any prior trust or power) or which otherwise is or may become held on trusts distinct from those relating to the residue of the Trust Fund at such value and in such manner as the Trustees shall in their discretion think fit and any appropriation so made shall be binding on all persons in any manner interested hereunder

Power to appoint investments by way of advancement (*d*).

10. Where the Trustees have power to apply capital money for the advancement or benefit of any person they may (in lieu of applying capital money) appoint by instrument in writing that the Trust Fund or any specified part thereof shall be held in its existing state upon trust to transfer the same to such person for his own absolute use and benefit freed and discharged from the trusts hereof and shall upon making such appointment forthwith transfer accordingly the property so appointed

Provided always that

(a) the value at the time of the appointment of the property so appointed shall not exceed the amount of capital money properly applicable for the benefit of such person pursuant to the power and if capital money applied for his benefit pursuant thereto would in some event become liable to be brought into account in any manner then an amount equal to the said value of the said property shall be brought into account in the same event and in the same manner and

(b) no such appointment shall be made without such consent (if any) as would have been requisite for the application of capital money for the benefit of such person pursuant to the power

Power to make payments and transfers to the trustees of other trusts (*e*).

11.* (A) Where the Trustees have power to apply capital money for the advancement or benefit of any person or have a

(*d*) Under the statutory power of advancement only money may be advanced, and so also under an express power to raise sums out of capital for a beneficiary. It is sometimes more convenient to transfer investments to the beneficiary, but without express power to do so this would involve (i) an advance of money, followed by (ii) a purchase of the investments by the beneficiary with the money advanced, attracting *ad valorem* stamp duty on the transfer of the investments.

(*e*) The purpose of this paragraph is to authorise a wider class of transactions of the type approved in *Re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902, [1956] 3 All E.R. 332, and earlier cases. Without a provision such as this, an advance to the trustees of another settlement

power or discretion to apply income for the benefit of any person the payment of any capital money or income (as the case may be) to the trustees of any other trust under which such person is interested shall (but only if the Trustees in their discretion consider the payment to be for his benefit) be deemed to be a proper application of capital money or income (as the case may be) pursuant to the power or discretion

(B) Where the Trustees have power under the last foregoing paragraph of this Schedule to appoint any property in favour of any person in the manner therein mentioned they may in lieu of appointing the said property in the manner aforesaid (but subject to the same provisions and with the like consequences as in the case of such appointment and only if the Trustees in their discretion consider it for the benefit of such person so to do) appoint by instrument in writing that the said property shall be held in its existing state upon trust to transfer the same to the trustees of any other trust under which such person is interested freed and discharged from the trusts hereof and shall upon making such appointment forthwith transfer accordingly the property so appointed

(C) For the purposes of this paragraph "trust" shall mean any trust created by any settlement declaration of trust will codicil or other instrument under the law in force in any part of the world and a person shall be deemed to be interested under a trust (whether or not he is the principal beneficiary thereunder and notwithstanding that his interest is liable to be affected or defeated by any exercise of any power vested in any person) if any capital or income comprised in the trust is or may become liable to be transferred paid applied or appointed to him or for

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may not be proper unless the other settlement is of a very simple character: see *Re Wills' Will Trusts* [1958] 3 W.L.R. 101, 107–108.

The present provision should enable capital (and also income which is distributable under a discretionary trust) to be switched more easily to another settlement when convenient, if the other settlement contains some provision similar to para. 2 above.

It may in some cases be necessary to insert in the settlement some such clause as the following: "The power to make payments and transfers to the trustees of other trusts in the Schedule hereto shall not authorise any payment or transfer to the trustees of any trust under which the Settlor or any person the Settlor may have married is interested within the meaning of the power."

his benefit either pursuant to the terms of the trust or in consequence of an exercise of any power or discretion thereby conferred on any person

(D) The provisions of this paragraph shall have effect notwithstanding any rule of law or equity restricting the delegation of a power or discretion

Power to disclaim benefits (*f*).

12.* Any person of full age to whom or for whose benefit any capital or income may be liable to be appointed transferred paid or applied by or in consequence of an exercise of any power or discretion vested in the Trustees or in any other person may by deed revocably or irrevocably disclaim his interest as an object of such power or discretion either wholly or with respect to any specified part or share of such capital or income and in such case the said power or discretion shall forthwith (but if the disclaimer be revocable then only for so long as the same remains unrevoked) cease to be exercisable for appointing transferring paying or applying any capital or income of the Trust Fund (or any of the specified part or share of such capital or income as the case may be) to or for the benefit in any manner of such person anything elsewhere herein contained to the contrary notwithstanding

Provision for trustees' remuneration (*g*).

13.* (A) Any trustee for the time being hereof being a solicitor or other individual engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done and time spent and services rendered by him or his firm in the execution of the trusts and powers hereof whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person

(*f*) It is considered doubtful whether without some express power the object of, *e.g.*, a discretionary trust of income can effectively disclaim his interest thereunder. And it may be as often convenient for him to be able to do so as it is for a life tenant to be able to surrender his life interest.

The presence of this power could result in a discretionary trust of income failing prematurely (by all the objects disclaiming their interests). The ultimate trust in the settlement should therefore be in such terms as to catch any income undisposed of as a result of premature failure of the discretionary trust.

(*g*) It may in some cases be necessary to insert in the settlement some such clause as the following: "The provision for trustees' remuneration

(B) The power of appointing a new or additional trustee hereof shall include power to appoint any corporation to be a trustee hereof with such powers rights and benefits as to remuneration or otherwise as the person or persons making the appointment shall in his or their discretion think fit and any corporation acting as a trustee hereof shall have such powers rights and benefits as to remuneration or otherwise as may so have been appointed or (in any other case) as may have been specified in the corporation's published terms and conditions as to the acceptance of trusts current at the date when it commenced so to act

Power to appoint trustees outside the jurisdiction.

14.* A person may be appointed to be and may act as a trustee hereof (in the case of an individual) notwithstanding that he may reside or be domiciled outside the jurisdiction of the High Court of Justice or (in the case of a corporation) notwithstanding that it may reside or carry on business or be incorporated outside such jurisdiction and the statutory power of appointing new trustees hereof shall not be exercisable for appointing any new trustee hereof in the place of an existing trustee hereof by reason only that he remains out of the United Kingdom for more than twelve months

Provision as to trustee-directors' emoluments (*g*).

15.* No trustee hereof shall be liable to account for any remuneration or other profit received by him in consequence of his acting as or being appointed to be a director or other officer or servant of any company notwithstanding that his appointment was procured by an exercise by him or by the Trustees of voting rights attached to securities comprised in the Trust Fund or by any abstention from exercising such voting rights

Provisions as to trustees' power and discretions (*h*).

16. (A) The Trustees shall exercise each and all of the powers and discretions vested in them in such manner as they

in the Schedule hereto shall not authorise the Settlor or any person the Settlor may have married to charge or be paid while a trustee hereof any such charges as are therein specified and the provision as to trustee-directors' emoluments in the said Schedule shall not apply to the Settlor or any such person while a trustee hereof."

(*h*) In referring to the Trustees' discretion in other parts of the settlement it will be unnecessary to use the words "absolute and uncontrolled" each time, and powers can be given to the Trustees without adding "in their absolute and uncontrolled discretion."

shall think most for the benefit of the persons actually or prospectively interested hereunder or of any one or more exclusively of the others or other of such persons and in exercising any power or discretion for the benefit of any one or more of such persons may ignore entirely the interests of all the others or other of them

(B) Subject thereto every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion and the Trustees shall have the like discretion in deciding whether or not to exercise any such power

Provision limiting powers and discretions (*i*).

17.* Notwithstanding anything in this Schedule or elsewhere herein contained no discretion or power hereby conferred on the Trustees or on any other person shall be exercisable at any time after the expiration of twenty-one years from and after the death of the last survivor of the persons now living who are parties hereto or are otherwise referred to by name herein and the issue now living of his late Majesty King Edward the Seventh

Interpretation Clause.

18. (A) In this Schedule and elsewhere herein where the context so admits

(i) "investments" includes any property of any kind whatsoever other than cash

(ii) references to the issue of any person include the children and remoter issue of such person

(iii) the expressions defined in section 68 of the Trustee Act 1925 (so far as used herein) have the respective meanings specified in that section (*k*)

(B) The marginal notes to this Schedule are inserted only for references to the provisions of this Schedule and shall not affect the construction of such provisions

(C) The powers contained in this Schedule are in addition to the powers otherwise vested in the Trustees

(*i*) It is assumed that all the beneficiaries who are in existence at the date of the settlement will be mentioned by name, either in the recitals or in some definition of a class of beneficiaries. If any perpetuity period is used in the body of the settlement it should be defined by reference to the same lives in being as here.

(*k*) See, for instance, the definitions of "income," "Property," "Securities," and "Stock."

FORM 25

A "Table A" (by way of Deed Poll) to govern a series of Building Leases (by subdemise) and Model Form of Underlease.

(*Supplied by Messrs. Woodcock & Sons, Solicitors, of Haslingden, Lancashire*)

I

TO ALL TO WHOM THESE PRESENTS SHALL COME

THE AB BUILDING COMPANY LIMITED whose registered office is at —— in the County of —— (hereinafter called "the Company") sends greeting

WHEREAS:—

(1) The Company is possessed of several pieces of land of considerable extent at —— aforesaid for the respective residues now unexpired of several long terms of years some of which land is held direct of the freeholder and the residue of which is held of the immediate lessee of the freeholder (*a*) and the Company may also acquire other land there

(2) The Company intends from time to time to subdemise portions of the said land for long terms of years and is desirous that the documents by which such subdemises shall be effected shall incorporate the provisions hereinafter mentioned

(3) The Company has determined to settle and place on record certain covenants provisos conditions and agreements which may be incorporated by reference in any documents hereafter to be executed by it when subdemising any of its land or in any subdemises which may hereafter be executed by its underlessees whereby the length of such documents may be reduced materially without any alteration in their legal effect

(4) It is intended that these Presents shall be enrolled of record in the Central Office of the Supreme Court of Judicature

(*a*) Suitably modified the procedure can, of course, be used for a series of leases by a freeholder.

NOW THESE PRESENTS WITNESS that the Company hereby declares as follows:—

1. In these Presents and in the schedules hereto "Company" shall mean the Company and shall include its assigns, "underlease" shall mean any subdemise executed by the Company, "underlessee" shall mean any person or persons or corporation to whom an underlease is granted by the Company and shall include his her their or its executors administrators and assigns, "subdemise" shall mean any subdemise executed by an underlessee or sublessee, "sublessor" and "sublessee" shall mean any person or persons or corporation by or to whom a subdemise is granted and shall include his her their or its executors administrators and assigns, "demised land" shall mean the piece or pieces of land comprised in and demised by the underlease or subdemise, "term" shall mean the term of years for which the demised land is subdemised by the underlease or subdemise, and "reserved rent" shall mean the rent or rents reserved or made payable by the underlease or subdemise.

2. The clauses contained in the first schedule hereto shall henceforth be deemed to be the standard form of covenant on the part of the underlessee to be inserted in an underlease and may be incorporated in any underlease or subdemise by reference to these Presents and when so incorporated shall have effect as if therein set forth at full length but when incorporated in a subdemise shall have effect as if there had been inserted in such clauses wherever the word "Company" occurs the words "sublessor and the Company" or "sublessor or the Company" as the context may require and wherever the word "underlessee" or the word "underlease" occurs the word "sublessee" or the word "subdemise" as the case may be.

3. The clauses contained in the second schedule hereto shall henceforth be deemed to be the standard form of covenant on the part of the Company to be inserted in an underlease and may be incorporated in any underlease or subdemise by reference to these Presents and when so incorporated shall have effect as if therein set forth at full length but when incorporated in a subdemise shall have effect as if there had been inserted in such clauses wherever the word "Company"

or the word "underlessee" or the word "underlease" occurs the word "sublessor" or the word "sublessee" or the word "subdemise" as the case may be.

4. The clauses contained in the third schedule hereto shall henceforth be deemed to be the standard form of proviso condition and agreement to be inserted in an underlease and may be incorporated in any underlease or subdemise by reference to these Presents and when so incorporated shall have effect as if therein set forth at full length but when incorporated in a subdemise shall have effect as if there had been inserted in such clauses wherever the word "Company" or the word "underlessee" or the word "underlease" occurs the word "sublessor" or the word "sublessee" or the word "subdemise" as the case may be.

5. Nothing herein contained shall be deemed to set up or institute any building scheme or to give any underlessee or sublessee any right to insist on the insertion of or to enforce compliance with any covenant not expressly or by reference contained in his underlease or subdemise and the Company may from time to time release vary or modify any covenant proviso condition or agreement in such manner as it may in its uncontrolled discretion think fit.

6. In witness whereof the Company has caused its common seal to be hereunto affixed this —— day of —— one thousand nine hundred and ——.

The First Schedule before referred to

Underlessee's covenants:

to pay rent;

(1) To pay the reserved rent on the days and in manner at and in which the same is reserved by the underlease.

to pay rates and taxes:

(2) To bear pay and discharge all rates taxes assessments duties impositions outgoings and burdens whatsoever (including the land tax if any) which during the term shall become payable in respect of the demised land and all erections for the time being thereon.

to fence;

(3) If the same has not already been done forthwith to fence off from the adjoining lands roads streets and footpaths and

enclose with a good and substantial fence so much of the demised land as does not form part of any road street or footpath and throughout the term to keep the same so fenced off and enclosed to the satisfaction in all things of the Company.

to build;

(4) If the same has not already been done forthwith to erect on the demised land and within twelve calendar months from the date of the underlease to complete and make fit for habitation and thenceforward during the term to maintain in good and substantial repair and condition and to the satisfaction of the Company at least one messuage or dwelling-house or other buildings permitted by the underlease of not less than the clear yearly letting value referred to in clause 6 of this schedule or the aggregate clear yearly letting value of three times the reserved rent whichever shall be the greater.

to observe certain standards of building and of value;

(5) To build every dwelling-house and other building on the demised land of good bricks or stone or both set in good lime mortar and of good timber and roofed with good slates or tiles.

(6) Not to erect or continue upon the demised land any dwelling-house or other building (other than an outbuilding) which shall be of less clear yearly letting value than the amount specified in the underlease or if not so specified then in the case of buildings facing —— of —— —— pounds and on the —— side —— pounds and in the case of buildings fronting to —— —— pounds and in the case of buildings elsewhere on the demised land —— pounds or any dwelling-house or other building or any fence or erection (other than a boundary wall or fence previously approved of in writing by the Company) nearer to the external boundaries of the demised land than the building lines indicated in the plan drawn on the underlease nor except such as shall respectively be in accordance as to situation architectural and general design and character elevations form workmanship materials sewers drains yards ashpits offices and outbuildings with such plans and specifications as shall have been previously approved of in writing by the Company and in particular to leave open and unbuilt upon spaces of at least the width indicated in the plan drawn on the underlease or in any such plan approved of in writing by the Company as aforesaid between the gable end of each block of buildings

and the gable end of the next block of buildings and between the gable end of any buildings and the boundaries of the demised land except to the extent to which and so far only as semi-detached dwelling-houses or outbuildings may be erected in accordance with plans and specifications previously approved of as aforesaid.

to repair and rebuild;

(7) At the expense of the underlessee as occasion shall require throughout the term well and sufficiently to maintain pave empty cleanse and keep the demised land and all the dwelling-houses buildings offices outbuildings conveniences drains and sewers thereon or thereunder for the time being in good and substantial repair and condition and when necessary to rebuild the same in accordance with the covenants by the underlessee expressly or by reference contained in the underlease.

to make up roads;

(8) If the same has not already been done forthwith at the expense of the underlessee to form make and complete one half of all the roads or streets adjoining the demised land so far as co-extensive therewith and to the angle of junction thereof with such footpaths in such manner of such description with such materials and according to such system as the company shall specially direct in writing or print or as in the absence of any such special direction shall be specified in any direction or specification of the local authority applicable thereto.

to maintain roads;

(9) At the expense of the underlessee throughout the term after the said halves of the said roads or streets and the said footpaths shall have been so formed made and completed to maintain the same in good condition and complete repair to the entire satisfaction of the Company until the same shall respectively be taken over and become maintainable by the local authority.

to lay drains;

(10) Forthwith at the expense of the underlessee to form and make all such main sewers drains and channels in through under and upon the demised land and the roads or streets adjoining thereto in such respective courses and directions and of such respective heights and levels and with such declivities and falls of such materials with such stench traps gully holes and grids and upon and according to such plans and systems and so as to join or coalesce with sewers drains and channels in or on the

adjoining lands roads or streets as the Company shall specially direct in writing or print or as in the absence of any such special direction shall be specified in any direction or specification of the local authority applicable thereto.

to maintain drains;

(11) At the expense of the underlessee throughout the term to maintain the said main sewers drains channels eyes stench traps gully holes and grids so formed and made as aforesaid in good condition and complete repair to the entire satisfaction of the Company until the same shall respectively be taken over and become maintainable by the local authority.

to permit Company to enter and carry out works;

(12) To permit the Company (after or without giving notice to the underlessee) at any time during the term before the said roads streets and footpaths main sewers drains channels eyes stench traps gully holes and grids shall have been formed made and completed as aforesaid or if default shall be made by the underlessee in maintaining the same as aforesaid to enter upon the demised land with surveyors workmen or others and to execute and do all such works and things as the Company shall think proper for forming making and completing or as the case may be maintaining any such road street footpath main sewer drain channel eye stench trap gully hole or grid as aforesaid and on demand to pay to the Company all expenses at the date of the underlease owing to or theretofore or thereafter incurred by it in or about the execution and doing of all or any such works and things as aforesaid.

not to commit a nuisance or carry on any trade or business;

(13) Not to do or suffer on the demised land or in any buildings for the time being thereon anything which shall or may become or grow to a public or private nuisance or damage disturbance annoyance or grievance to the Company or to any occupier of land or buildings for the time being belonging to the Company or in the neighbourhood of the demised land nor any trade business profession or occupation whatever except such as the Company shall by memorandum in writing endorsed on the underlease and under its common seal or signed by its assigns previously approve or have approved of and to use all dwelling-houses and buildings for the time being on the demised land only as private dwelling-houses or lodging-houses or for some such other purpose as aforesaid and the residue of the demised

land only as the site of the offices outbuildings gardens and other appurtenances to such dwelling-houses and buildings and (with a view of rendering more stringent the restrictive covenants expressly or by reference contained in the underlease and not of modifying the same) not to use or suffer to be used any part of the demised land or any buildings for the time being thereon as a club or place for the sale supply or consumption therein or thereon whether by members or non-members of ale beer porter wines or spirituous liquors or as a club or institute of any character or description whatsoever without the express consent in writing of the Company signified by memorandum endorsed on the underlease.

to repair according to stated standard;

(14) To keep every building for the time being on the demised land and all walls palings and palisades belonging thereto in good and substantial repair and condition at all times and from time to time to paper and paint as often as occasion shall require such parts thereof as are usually or ought to be papered and painted and to leave them in the like condition at the determination of the term.

to permit Company's agents to enter and inspect state of repair;

(15) To permit the Company or its agent architect or surveyor with or without workmen and otherwise twice or oftener in every year during the term at all convenient times to enter upon the demised land and all buildings for the time being thereon to view the state of repair thereof and if any repairs shall be found wanting the same shall forthwith be made good by the underlessee after notice thereof shall have been given.

to contribute towards maintenance of services;

(16) To bear and allow a reasonable proportion of the expense of making repairing renewing and cleansing all ways roads pavements party and fence walls cesspools sewers drains pipes watercourses and other easements used or to be used by the occupiers of the demised land or any buildings for the time being thereon in common with the occupiers of any other land of the Company or any buildings for the time being thereon such proportion in case of dispute to be ascertained by the architect or surveyor for the time being of the Company.

to pay cost of notices;

(17) To pay all costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Company for the purpose of or incidental to the preparation and service of

any notice under the underlease or of a notice under section 146 of the Law of Property Act 1925.

(18) At the determination of the term to yield up the demised land and all buildings and erections which shall have been erected upon the same during the term in such state of repair and condition as shall be consistent with the due observance and performance of the covenants expressly or by reference contained in the underlease. to yield up.

THE SECOND SCHEDULE BEFORE REFERRED TO

(1) The underlessee paying the reserved rent and observing and performing the covenants by the underlessee and the conditions expressly or by reference contained in the underlease may peaceably hold and enjoy the demised land and all buildings for the time being thereon during the term without any lawful interruption by the Company or any person or persons lawfully claiming under it. Company's covenants: for quiet enjoyment;

(2) During the term to pay all and singular the yearly rent or rents reserved by the superior lease or underlease and to observe and perform all and every the covenants and conditions therein contained and on the part of the Company to be observed and performed after the date of the underlease. to observe covenants in head-lease;

(3) At all times during the term to keep the underlessee indemnified against all actions suits proceedings costs damages claims and demands on account of the non-payment of the last mentioned rent or rents or any of them or any part thereof respectively or the breach non-observance or non-performance of the last mentioned covenants and conditions or any of them. to keep underlessee indemnified.

THE THIRD SCHEDULE BEFORE REFERRED TO

(1) Any one or more of the covenants expressly or by reference contained in the underlease may be varied or waived with the previous written consent of the Company signified by memorandum endorsed on the underlease and under its common seal or signed by its assigns. Provisos and conditions: power to waive or modify covenants;

proviso for re-entry;

(2) If and whenever any part of the reserved rent shall be in arrear and unpaid for thirty days after becoming payable (whether formally demanded or not) or if default shall be made in the observance or performance of any covenant on the part of the underlessee or condition expressly or by reference contained in the underlease then and in any such case the Company may re-enter upon the demised land or any building for the time being thereon or any part thereof in the name of the whole and thereupon the demise effected by the underlease shall absolutely determine but without prejudice to the right of action of the Company in respect of any breach of the covenants on the part of the underlessee expressly or by reference contained in the underlease.

(3) No re-entry shall be made under the preceding clause (except for non-payment of rent) unless and until the Company or its agents shall have given notice in writing of the intention of the Company to re-enter and of the specific breach or breaches of covenant in respect of which the re-entry is intended to be made and default shall have been made by the underlessee for three calendar months after such notice in repairing every such breach and in performing and observing every covenant referred to in such notice.

notices;

(4) Any demand or notice required or authorised by the underlease to be made or served or given shall be sufficiently made or served or given if made or served or given in accordance with section 196 of the Law of Property Act 1925.

expenses.

(5) Any moneys or expenses in addition to rent which are made payable by the underlease to the Company by the underlessee with interest at the rate of five per centum per annum from the date of any demand for payment shall be a charge (*b*) on the demised land and any buildings for the time being thereon and shall be recoverable by the Company accordingly by sale or such other means as may be available in that behalf under the Law of Property Act 1925 or otherwise.

(*b*) To be fully effective, this clause requires registration under the Land Charges Act, 1925.

II

THIS UNDERLEASE made the —— day of —— one thousand nine hundred and —— BETWEEN the AB BUILDING COMPANY LIMITED whose registered office is at —— in the County of —— (hereinafter called "the Company" which expression where the context so admits shall include its assigns) of the one part and —— of —— in the County of —— (hereinafter called "the Underlessee" which expression where the context so admits shall include his executors administrators and assigns) of the other part

WITNESSETH as follows:—

1. The Company hereby demises unto the Underlessee ALL THAT plot of land containing —— square yards or thereabouts situate at —— aforesaid and delineated and shown with the roads streets and footpaths intended to be enjoyed in common by the Company and the Underlessee and their respective lessees and tenants in the plan drawn hereupon and therein edged pink [except all mines and minerals] TO HOLD the same unto the Underlessee from the date hereof for the residue of a term of —— years computed from the — day of —— 19— PAYING therefor during the said term yearly and proportionately for any fraction of a year the rent of —— pounds —— shillings and —— pence by equal half-yearly payments to be made on the first days of March and September in every year the —— to be made on the first day of —— and in each case without any deduction except for landlords property tax

2. The Underlessee for himself and his assigns and to the intent that the obligations may continue throughout the said term hereby covenants with the Company that the Underlessee will at all times during the said term duly and punctually observe and perform all the covenants and agreements which are set out in the first and third schedules to a deed poll under the seal of the Company bearing date the —— day of —— 19— and enrolled of record in the Central Office of the Supreme Court of Judicature on the —— day of —— 19— in the same manner in all respects as if such covenants and agreements were herein set forth at full length

3. The Company hereby covenants with the Underlessee that the Company will at all times during the said term duly and punctually observe and perform all the covenants and agreements which are set out in the second and third schedules to the said deed poll in the same manner in all respects as if such covenants and agreements were herein set forth at full length

4. Provided always and it is hereby expressly agreed that all the provisos conditions and agreements which are set out in the third schedule to the said deed poll shall apply to and be deemed to be incorporated in these Presents and to and in the demise hereby made and these Presents and the demise hereby made shall have effect in the same manner in all respects as if such provisos conditions and agreements were herein set forth at full length

5. [*Acknowledgment and undertaking if required*]

In witness whereof the Company has caused its common seal to be hereunto affixed and the Underlessee has hereunto set his hand and seal the day and year first before written

FORM 26

Scheme for avoiding operation of Part II of the Landlord and Tenant Act, 1954 (*a*)

(*Drafted by Peter Elman, Barrister-at-Law*)

THIS LICENCE is made the —— day of —— 19— BETWEEN —— of —— (hereinafter called "the Licensor") of the one

(*a*) In (1957) 21 Conv.(N.S.) 723, there is a form of a lease of business premises intended to avoid the operation of Part II of the Landlord and Tenant Act, 1954, by incorporating a general prohibition of user for business purposes extending to the whole property during the last year of the term. Apart from the doubts and criticisms of this device which have already been expressed (*ibid.*, pp. 257–259), it is probable that a lease so drafted might be construed by the courts as, in fact, comprising two separate leases and that as a result, on or before the termination of the first or "business purposes" lease, the tenant could, in respect thereof, make an application under Part II of the Landlord and Tenant Act, 1954, for its continuation and renewal, the second lease being in the process surrendered.

The present form attempts to circumvent this possible objection. The suggestion is that the method to be adopted is to grant a lease of the premises for the required term plus an additional year at a nominal rent, the lease to contain the usual covenants together with a general prohibition of user for business purposes extending to the whole of the property, sufficient to comply with the provisions of s. 23 (4) of the Landlord and Tenant Act, 1954. Subsequent to the granting of the lease, the landlord would grant the tenant a licence in the present form for the required term less the additional year as aforesaid to use the property for certain specified business purposes in consideration of a yearly payment which, together with the nominal rent under the lease, would equal the rent which the landlord desires to obtain from the property. The effect is that so soon as the contractual term of the licence comes to an end the tenancy at the nominal rent becomes, again, one to which the Act does not apply, provided that the landlord does not permit the user under the licence to continue or otherwise consents thereto or acquiesces therein.

The rather limited scope of the earlier form is avoided since the tenant will only be paying a nominal rent during the last year when he is unable to use the property for business purposes, while the objection that s. 38 of the Landlord and Tenant Act, 1954, might apply to avoid the operation of the licence may be countered by observing that the tenancy as such is, from the outset, not one to which the Act applies and therefore the licence is not an agreement relating to such a tenancy.

It is, however, clear that as with the earlier form, until the question is tested in the courts, there is no certainty that the suggested method of "getting round" the Act is efficacious.

part and —— of —— (hereinafter called "the Licensee") of the other part

WHEREAS:—

(1) By a Lease dated the —— day of —— 19— and made between the Licensor of the one part and the Licensee of the other part ALL THAT (PARCELS) was demised to the Licensee for a term of —— years from the —— day of —— 19— at the yearly rent and subject to the lessee's covenants and conditions therein contained

(2) The said Lease contained a covenant on the part of the Licensee not to use the demised premises or any part thereof for the purposes of any business trade profession or employment whatsoever

(3) The reversion immediately expectant on the term granted by the said Lease is now vested in the Licensor

(4) The Licensee being desirous of carrying on upon the demised premises the business and trade of —— has requested the Licensor and the Licensor has agreed to grant him a licence for that purpose upon the terms and conditions hereinafter set out

NOW THIS LICENCE made in pursuance of the said agreement WITNESSETH as follows:—

1. The Licensor hereby grants to the Licensee the liberty for a term of —— years from the date hereof if the Licensee shall so long personally remain in actual occupation of the demised premises to carry on in and upon the same the business and trade of —— Provided that this Licence shall not authorise any person in whom the demised premises shall be vested under the said Lease or who shall be in occupation of the same other than the Licensee to use the same for the purposes of such business and trade or any other business trade profession or employment without a further licence of the Licensor

2. The Licensee shall during the subsistence of this Licence pay to the Licensor the yearly sum of £—— payable by equal quarterly instalments commencing on the —— day of —— 19— and thereafter on the usual quarter days

3. The Licensee shall pay or alternatively indemnify the Licensor in respect of any outgoings or other charges relating

to the demised premises which might at any time during the subsistence of this Licence become payable by reason of the exercise of the powers of the Licensee hereunder

4. The Licensee shall obtain all necessary consents and permission from the local and other public authority or body and do all other necessary acts and things as may be required for the purposes of this Licence

5. The Licensee shall in the exercise of his powers hereunder not do or permit or suffer to be done anything which shall or may cause any damage nuisance or annoyance to the owners and occupiers of any of the adjoining or neighbouring property

6. This Licence shall be irrevocable for the said term of —— years from the date hereof Provided nevertheless that the Licensor may by notice in writing addressed to the Licensee at the demised premises determine this Licence upon the happening of any of the following events namely:

(a) If the Licensee shall fail to pay to the Licensor the said quarterly instalments within fourteen days after the time hereinbefore appointed for the payment thereof whether lawfully demanded or not or

(b) If the Licensee shall fail to observe and perform any of the covenants and conditions on his part hereinbefore contained

And forthwith upon delivery of such notice this Licence shall determine but without prejudice to the rights of either party arising out of any antecedent breach of this Licence

7. It is hereby declared that except as aforesaid this Licence shall not prejudice or affect any of the covenants conditions or provisions in the said Lease contained

IN WITNESS, *etc.*

FORM 27

Express Powers of Advancement (*a*)

I

Widest Possible Power in relation to Personalty Fund (with variations for imposing limitations)

(1) Notwithstanding the trusts powers and provisions hereinbefore contained of and concerning the Trust Fund [my Residuary Estate] the Trustees shall [in any of the circumstances hereinafter mentioned] in relation to so much of the Trust Fund [my Residuary Estate] as shall for the time being and from time to time remain vested in the Trustees and shall not have been appropriated for giving effect to a vested interest therein (*b*) have power in their absolute discretion at any time or times [during the prescribed period] (*c*) and from time to time:

(a) to raise the whole or any part or parts of the Trust Fund [my Residuary Estate] and pay apply or appropriate the same as the Trustees shall in their absolute discretion think fit for the benefit of any person who may for the time being be entitled to a vested or contingent interest in the Trust Fund [my Residuary Estate]

(b) by deed revocable or irrevocable to revoke the trusts and provisions of and concerning the Trust Fund [my Residuary Estate] hereinbefore contained in regard either to the whole of the Trust Fund [my Residuary Estate] or any part or parts thereof and in lieu thereof to appoint such other trusts for the benefit of all or any one or more to the exclusion of the other or others of the persons then for the time being entitled to a vested or contingent interest in the Trust Fund [my Residuary

(*a*) For an accompanying article see *ante*, p. 413.

(*b*) It is assumed the Settlement or Will will contain a power of appropriation.

(*c*) This limitation will not be required if all the possible beneficiaries are lives in being.

Estate] and their issue as the Trustees shall in their absolute discretion think fit but without infringing the rule against perpetuities and so that any exercise or purported exercise of the power of revocation aforesaid shall only take effect if and to the extent that the trusts appointed under the power of appointment aforesaid shall have effect

(2) If and as often as the Trustees shall exercise either of the said powers lettered (a) and (b) conferred by the preceding paragraph of this clause in relation to a part only of the Trust Fund [my Residuary Estate] the Trustees shall at the time of such exercise signify in writing which of the two following alternative provisions is to have effect that is to say:

(a) whether the part or parts of the Trust Fund [my Residuary Estate] affected by the exercise shall be brought into account in the event of the person or persons benefiting thereby becoming absolutely and indefeasibly entitled to a share in the remainder of the Trust Fund [my Residuary Estate] as part of such share or

(b) whether the trusts and provisions of and concerning the remainder of the Trust Fund [my Residuary Estate] shall have effect as if the part or parts of the Trust Fund [my Residuary Estate] so affected had never formed part of the Trust Fund [my Residuary Estate]

(3) For the avoidance of all doubt it is hereby declared that the powers hereinbefore conferred upon the Trustees may if the Trustees think fit be exercised without regard to the amount or value of the presumptive or vested share in the Trust Fund [my Residuary Estate] of the person or persons in whose favour the powers are exercised or to any resulting diminution or extinction of the share or interest in the Trust Fund [my Residuary Estate] of any other person or persons

[(4) The prescribed period shall be the period commencing at the date of these presents [my death] and ending at the expiration of twenty-one years after the death of all the descendants then living of his late Majesty King George VI]

[(5) The circumstances in which either or both of the powers aforesaid shall be exercisable are as follows:

(a) If X shall make a request in writing to the Trustees to exercise one or both of the said powers specifying the reasons for making such request

(b) On the marriage of any person entitled to a vested or presumptive interest in the Trust Fund [my Residuary Estate]

(c) [*add other circumstances as desired*]]

II

Power in relation to Settled Land (*d*)

(1) The Trustees for the time being for the purposes of the Settled Land Act 1925 shall [during the prescribed period] in relation to the settled land and to any capital moneys arising under the Settled Land Act 1925 have all such powers as are conferred by section 32 of the Trustee Act 1925 as if that section applied to settled land and to capital moneys arising under the said Act and subsection (2) of the said section shall be modified read and construed accordingly

(2) The prescribed period [*continue as in paragraph (4) of preceding form*]

III

Extension of Statutory Power

Section 32 of the Trustee Act 1925 shall apply to these presents [to this my Will] save and except that the Trustees shall have power to pay or apply in like manner as under the said section any part or parts of the Trust Fund [my Residuary Estate] up to and including the full amount of the presumptive or vested share or interest of any person in the Trust Fund [my Residuary Estate]

(*d*) A very wide power would usually be inappropriate.

FORM 28

I

Deed of Exchange between Tenants in Common and Joint Tenants, a sum being paid by the Joint Tenants for equality of exchange, the mortgagee of the Joint Tenants' property concurring to release it from the charge. Variations where the property taken in exchange by the Joint Tenants is to be substituted as security for the mortgage debt

(*Drafted by E. H. Bodkin, Esq., of Lincoln's Inn*)

THIS DEED OF EXCHANGE is made the —— day of —— 19— BETWEEN A of *etc.* and B his wife of the first part C of *etc.* (hereinafter called the Mortgagee) of the second part and D of *etc.* and E his wife of the third part Parties.

WHEREAS:

(1) By the Conveyance on sale (hereinafter called the First Conveyance) dated the —— day of —— 19— and made between X of the one part and the said A and B of the other part the freehold property described in the First Schedule hereto was conveyed to the said A and B in fee simple upon trust to sell the same and to stand possessed of the net proceeds of sale and of the net rents and profits until sale In Trust for the said A and B as tenants in common in equal shares Recitals; Conveyance to A and B;

(2) By a Conveyance on Sale (hereinafter called the Second Conveyance) dated the —— day of —— 19— and made between Y of the one part and the said D and E of the other part the freehold property described in the Second Schedule hereto was conveyed to the said D and E in fee simple upon trust to sell the same and to stand possessed of the net proceeds of sale and of the net rents and profits until sale In Trust for the said D and E as joint tenants Conveyance to D and E;

(3) By a Legal Charge (hereinafter called the Legal Charge) dated the —— day of —— 19— and made between the said D and E of the one part and the Mortgagee of the other part the Mortgage by D and E;

said property described in the said Second Schedule hereto was (with other property) charged by way of legal mortgage with the payment to the Mortgagee of the sum of £Z with interest thereon as therein mentioned

[(4) The said principal sum together with the current half-yearly interest thereon is still owing on the security of the Legal Charge]

Agreement for exchange.

(5) The said A and B and the said D and E in exercise of their respective powers as such trustees for sale as aforesaid have agreed for the exchange of the said property described in the said First Schedule hereto for the said property described in the said Second Schedule hereto and for the payment by the said D and E (with the consent of the Mortgagee) to the said A and B of the sum of £— for equality of exchange and the Mortgagee being satisfied with the security which will remain under the Legal Charge after the execution of this Deed [the Mortgagee in consideration of the agreement by the said D and E to execute a Legal Charge by way of substituted security of the said property described in the said First Schedule hereto (which is to be taken in exchange by them) to secure the said principal sum and interest owing under the Legal Charge (which agreement the said D and E hereby acknowledge) and which Legal Charge is already prepared and is intended to bear even date with but to be executed after this Deed] has agreed to join in this Deed for the purpose of releasing the said property described in the said Second Schedule hereto from the Legal Charge

NOW THIS DEED WITNESSETH as follows:

Conveyance by A and B.

1. IN pursuance of the said agreement and in consideration of the Conveyance in exchange by the said D and E hereinafter contained and of the sum of £— now paid by the said D and E (with the consent of the Mortgagee) to the said A and B as such trustees as aforesaid for equality of exchange (the receipt whereof is hereby acknowledged) the said A and B AS TRUSTEES and in exercise of their statutory powers as trustees for sale under the First Conveyance [AS BENEFICIAL OWNERS] hereby convey unto the said D and E ALL THAT the said freehold property described

in the said First Schedule hereto TO HOLD the same unto the said D and E in fee simple (*a*)

Declaration of Trust.

2. (1) THE said D and E shall stand possessed of the said property hereinbefore conveyed to them UPON TRUST to sell the same or any part thereof with full power to postpone the sale and to stand possessed of the net proceeds of sale (after payment of costs) and of the net rents and profits until sale (after payment of all outgoings) IN TRUST for themselves as joint tenants

(2) Pending the sale of the whole of the said property pursuant to the trust for sale hereinbefore declared the said D and E or other the trustees for sale thereof for the time being shall during the joint lives of the said D and E and the life of the survivor of them and 21 years after the death of such survivor and during such further period (if any) as may be valid having regard to the rule against perpetuities have the same full and unrestricted power of dealing with or disposing of the said property or any part thereof for any purpose and in any manner in all respects as a sole absolute owner thereof

Conveyance by D and E with concurrence of Mortgagee.

3. IN further pursuance of the said agreement and in consideration of the conveyance in exchange by the said A and B hereinbefore contained the said D and E AS TRUSTEES and in exercise of their statutory powers as trustees for sale under the Second Conveyance [AS BENEFICIAL OWNERS] (*b*) hereby convey and the Mortgagee AS MORTGAGEE at the request of the said D and E hereby assigns and releases unto the said A and B ALL THAT the said freehold property described in the said Second Schedule hereto TO HOLD the same unto the said A and B in fee simple discharged from all principal moneys and interest secured by and from all claims and demands under the Legal Charge

Declaration of Trust.

4. (1) THE said A and B shall stand possessed of the said property hereinbefore conveyed to them UPON TRUST to sell the same or any part thereof with full power to postpone the sale and to stand possessed of the net proceeds of sale (after payment of

(*a*) The Conveyance should, it is considered, be made as beneficial owners only if the contract for exchange so provides. If it does, an undertaking for safe custody of the deeds by A and B should be added. The same applies to D and E, who should in that case give a covenant for safe custody of the deeds when they come into their possession.

(*b*) See note (*a*), *supra*.

costs) and of the net rents and profits until sale (after payment of all outgoings) IN TRUST for themselves as tenants in common in equal shares

(2) Pending the sale of the whole of the said property pursuant to the trust for sale hereinbefore declared the said A and B or other the trustees for sale thereof for the time being shall during the joint lives of the said A and B and the life of the survivor of them and 21 years after the death of such survivor and during such further period (if any) as may be valid having regard to the rule against perpetuities have the same full and unrestricted power of dealing with or disposing of the said property or any part thereof for any purpose and in any manner in all respects as a sole absolute owner thereof

Acknowledgment for production by A and B.

[5. THE said A and B hereby acknowledge the right of the said D and E to the production of the documents mentioned in the Third Schedule hereto the possession whereof is retained by them and to delivery of copies thereof]

Acknowledgment for production by Mortgagee.

6. THE Mortgagee hereby acknowledges the right of the said A and B to the production of the Legal Charge [and of the documents mentioned in the Fourth Schedule hereto] possession whereof is retained by him and to delivery of copies thereof [respectively] (*c*)

[7. Certificate of value]

IN WITNESS *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO

[This will contain particulars of A's and B's property]

(*c*) If the documents of title relating to the mortgaged property relate only to that property, they will be handed over to D and E, or be retained by the Mortgagee, if a new Mortgage is made to him. If they relate also to other property subject to the Mortgage, and have been handed over to the Mortgagee, an acknowledgment should be given by the Mortgagee, who will retain the deeds under the existing or the new Mortgage. If the Mortgagee will not give an acknowledgment, D and E must give a formal covenant for production. If the deeds have not been handed over to the Mortgagee on the occasion of the original Mortgage, D and E will give the acknowledgment. No acknowledgment in regard to the new Mortgage appears to be required in order to prove the consideration for the Mortgagee's concurrence, as the Mortgage and Deed of Exchange will be executed at the same time, and the consideration for his concurrence is the covenant to execute the Mortgage.

THE SECOND SCHEDULE ABOVE REFERRED TO
[This will contain particulars of D's and E's property]

THE THIRD SCHEDULE ABOVE REFERRED TO
[Documents of Title relating to A's and B's property]

THE FOURTH SCHEDULE ABOVE REFERRED TO
[Documents of Title relating to D's and E's property]

II

Legal Charge by way of substituted security to accompany the last Precedent

THIS SUBSTITUTED SECURITY is made the —— day of —— 19— BETWEEN D of *etc.* and E his wife (hereinafter called the Borrowers) of the one part and C of *etc.* (hereinafter called the Mortgagee) of the other part (*a*)

WHEREAS:

(1) This Deed is supplemental to a Legal Charge (hereinafter called the Principal Deed) dated the —— day of —— 19— and made between the Borrowers of the one part and the Mortgagee of the other part whereby the freehold property therein described was charged by way of legal mortgage with the payment to the Mortgagee of the principal sum of £X with interest thereon at the rate of £Y per annum

(2) By a Deed of Exchange bearing even date with but executed before this Deed and made between A and B of the first part the Mortgagee of the second part and the Borrowers of the third part certain property at —— in the County of —— therein described and forming part of the said property comprised in the Principal Deed was conveyed and assigned by the Borrowers with the concurrence of the Mortgagee to the said A and B discharged from all principal moneys and interest secured by the Principal Deed in consideration of the agreement by the Borrowers to execute a legal charge of the property

(*a*) The lettering in the preceding precedent is retained.

hereinafter described (which was by the said Deed of Exchange conveyed to them in exchange for the said property so discharged) by way of substituted security to secure the said principal sum and interest owing under the Principal Deed

(3) The said principal sum of £X together with the current half-yearly interest is still owing on the security of the Principal Deed.

NOW THIS DEED WITNESSETH as follows:

1. IN pursuance of the said agreement in the said Deed of Exchange the Borrowers hereby charge by way of legal mortgage ALL THAT *etc.* with the payment to the Mortgagee of the said principal sum interest and other moneys secured by the Principal Deed To the intent that the same property may become in all respects substituted as a security for the payment of the said principal sum interest and other money for the property so discharged as aforesaid

2. ALL the covenants powers and provisions expressed or implied in the Principal Deed shall extend and apply to the property hereby charged as if the same property had originally formed part of the property originally comprised therein and shall remain of full force and effect as regards the property remaining subject thereto notwithstanding the discharge in the said Deed of Exchange contained

IN WITNESS *etc.*

FORM 29

Option Agreement between two of three shareholders (who between them hold all the share capital) to secure that on the death of one of them full protection will be secured to the others (*a*)

THIS AGREEMENT under seal is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "Mrs. AB" of the one part and CAB of *etc.* (hereinafter called "Mr. AB") of the other part

WHEREAS:

(1) The issued capital of the company registered under the name of XY Ltd. (hereinafter called "the Company") consists of [100] shares of [£1] each

(2) Mrs. AB is the registered owner of 33 of the said shares in the Company Mr. AB is the registered owner of a further 33 of the said shares in the Company and DAB is the registered owner of the remaining 34 shares in the Company

(3) Mrs. AB has agreed with Mr. AB to grant to Mr. AB such option in regard to Mrs. AB's said 33 shares in the Company and to enter into such covenants upon such terms and subject to such provisions as are hereinafter contained

NOW THIS DEED WITNESSETH as follows:

1. Mrs. AB hereby grants to Mr. AB the exclusive option or right to acquire and take a transfer of Mrs. AB's said 33 shares in the Company on and subject to the following terms and conditions that is to say:

(i) The consideration to be provided by Mr. AB for the said shares shall be such as is provided by sub-clause (iii) of this Clause

(ii) The said option shall only become exercisable after the death of Mrs. AB and shall be exercised (if at all) by Mr. AB

(*a*) The situation for which the form was designed to provide is that of a mother, father and son being virtually equal shareholders in a private company, in which the mother wishes to safeguard the interests of her son in the company in the event of her death whilst at the same time (a) protecting the interests of the father and (b) ensuring that during her life the father will be unaware of any agreement.

serving a notice in writing in that behalf upon Mrs. AB's personal representatives provided that the said option shall not be capable of being exercised after the expiration of 12 months from the date when representation shall be granted of the estate of Mrs. AB or more than 21 years after the death of Mrs. AB

(iii) In the event of the said option being exercised as herein provided then if the said DAB shall be then living Mr. AB shall within 14 days thereafter deliver to Mrs. AB's personal representatives a Deed of Covenant duly executed by or on behalf of Mr. AB in the form set forth in the Schedule hereto (or as near thereto as the circumstances may require) or if the said DAB shall not be then living Mr. AB shall within the time aforesaid pay to Mrs. AB's personal representatives the sum of £10 And Mrs. AB's personal representatives shall thereupon deliver to Mr. AB the Certificate relating to the said shares issued by the Company together with a Transfer of such shares duly executed by such personal representatives in favour of Mr. AB or as he shall direct

(iv) For the purposes of this Clause the expression "Mr. AB" shall be deemed to include his executors administrators and assigns

2.—(i) Mrs. AB hereby covenants with Mr. AB and as a separate covenant with Mr. AB's wife EAB (to the intent that this covenant may be enforceable by Mr. AB or by his said wife) that if Mr. AB shall predecease Mrs. AB Mrs. AB will pay or procure the Company to pay weekly to Mr. AB's said wife during her lifetime or until she shall remarry whichever of the two sums following shall from time to time be the smaller namely the sum of £—— per week or such a sum per week as shall be equal to [*a specified fraction*] of the amount of the net profits made by the Company in the financial year by reference to which the books of the Company shall be made up being the complete financial year from time to time immediately preceding the date of any such weekly payments

(ii) Within one month after the end of each financial year of the Company Mrs. AB shall cause the auditors of the Company to prepare an account showing therein the net profit of the Company and to certify in writing the weekly amount to which Mr. AB's said wife shall for the time being be entitled under the

provisions of sub-clause (i) of this Clause and unless some error shall be discovered within 14 days after the issue of the aforesaid Certificate of the said auditors such Certificate shall (in the absence of fraud) be conclusive evidence of the amount payable hereunder

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO

THIS DEED OF COVENANT is made the —— day of —— 19— BETWEEN CAB of *etc.* (hereinafter called "Mr. AB") of the one part and PQ of *etc.* and RS of *etc.* [Mrs. AB's *personal representatives*] (hereinafter called "the Trustees") of the other part

WHEREAS:

(1) AB late of —— in the County of —— died on the —— day of —— 19— having by her Will dated the —— day of —— 19— appointed the Trustees to be her executors which Will was duly proved by them in the —— Probate Registry on the —— day of —— 19—

(2) In pursuance of the provisions of an Agreement dated the —— day of —— 19— Mr. AB has by a notice in writing dated the —— day of —— 19— and duly served upon the Trustees notified the Trustees of his intention to exercise the option thereby granted

(3) It was a term of the said agreement (in the events which have happened) that in the event of the said option being exercised Mr. AB should within 14 days thereafter deliver to the Trustees a Deed of Covenant duly executed by Mr. AB in the form of this deed

NOW THIS DEED WITNESSETH as follows:

1. THE provisions of this deed shall become operative as soon as (but not before) Mr. AB shall be registered in the books of the Company as the owner of the shares comprised within the said option granted by the Agreement hereinbefore recited or as soon as he could be or become so registered if Mr. AB took such steps as may be necessary to obtain registration

2. MR. AB hereby covenants with the Trustees and as a separate covenant with DAB (to the intent that this covenant may be enforceable by the Trustees or by the said DAB) as follows:

(1) Mr. AB will not do or omit to do any act or thing which will prevent the said DAB from retaining his office as a director of the Company registered under the name of XY Ltd. (hereinafter called "the Company") unless and until the said DAB shall declare in writing his desire to retire from such office

(2) (i) So long as the said DAB shall be and remain a director of the Company Mr. AB will (unless the said DAB shall elect to receive a smaller sum) pay or procure the Company to pay weekly to the said DAB whichever of the two sums following shall from time to time be the smaller namely the sum of £—— per week or such a sum as shall be equal to [*a specified fraction*] of the amount of the net profits made by the Company in the financial year by reference to which the books of the Company shall be made up being the complete financial year from time to time preceding the date of any such weekly payments

(ii) From and after the date when the said DAB shall cease to be a director of the Company (or if he shall have ceased to be such a director before this deed shall come into operation then from and after the date hereof) Mr. AB will pay or procure the Company to pay weekly to the said DAB during his lifetime whichever of the two sums following shall from time to time be the smaller namely the sum of £—— per week or such a sum as shall be equal to [*a specified fraction*] of the amount of the net profits made by the Company as ascertained in accordance with the foregoing and following provisions of this Clause

(iii) Within one month after the end of each financial year of the Company Mr. AB shall cause the auditors of the Company to prepare an account showing therein the net profit of the Company and to certify in writing the weekly amount to which the said DAB shall for the time being be entitled under the provisions of sub-clauses (i) and (ii) of this Clause and unless some error shall be discovered within 14 days after the issue of the aforesaid Certificate of the said auditors such Certificate shall (in the absence of fraud) be conclusive evidence of the amount payable hereunder

(3) In the event of Mr. AB predeceasing the said DAB and of his dying possessed of more than one half of all the said shares

in the Company Mr. AB's personal representatives will within one month from the date of their obtaining a grant of representation to the estate of Mr. AB deliver to the said DAB a Transfer of such number of shares (if any) as may be required to secure that the total number of shares in the Company then vested in the personal representatives of Mr. AB shall not exceed the total number of such shares vested in the said DAB and the said personal representatives shall take all such other steps as may be necessary to complete such Transfer of the said shares

IN WITNESS *etc.*

FORM 30

Statutory Declaration relating to Missing Title Deeds (*a*)

I AB of *etc.* do solemnly and sincerely declare as follows:

1. BY a Conveyance (hereinafter called "the said Conveyance") dated the —— day of —— 19— and made between CD of the one part and myself of the other part the said CD conveyed to me in fee simple the freehold land having a frontage of about —— feet to —— in the Parish of —— in the County of —— and containing —— acres or thereabouts [forming parts of enclosures Nos. —— and —— on the O.S. Map (19— edition) for the Parish of —— aforesaid] which said property was more particularly described in the said Conveyance and by way of identification only more particularly delineated on the plan drawn thereon and thereon coloured pink (all of which property is hereinafter called "the said property")

2. THE said Conveyance was duly executed by both parties and attested and was duly stamped £ —— [and was also stamped with a production stamp under the provisions of the Finance Act 1931]

3. I verily believe that a copy of the said Conveyance which is set out in the Schedule to a Deed of Confirmation dated the —— day of —— 19— and made between the said CD of the one part and myself of the other part is a full and complete copy thereof and accurate in every particular. A true copy of the said Deed of Confirmation is now produced and shown to me marked "A".

4. THE said Conveyance together with an abstract of the earlier title relating to the said property were in or about the month of —— 19— delivered into my possession by Messrs. EF of —— in the said County of —— the firm of Solicitors who acted for me in connection with my purchase of the said property

5. IMMEDIATELY after receiving the said Conveyance and Abstract into my possession as aforesaid I placed the same in my desk [*or as the case may be*] at my office situate at ——

(*a*) For an article on the subject of missing title deeds, see Vol. 13, pp. 349–362.

6. ON or about the —— day of —— 19— my said office and the entire contents thereof were destroyed by fire and no trace of the said Conveyance or Abstract could be or was found

7. I last remember seeing the said Conveyance and Abstract in my said [desk] in or about the month of —— 19— and thereafter the same were not removed therefrom by me or by my order and I verily believe that the same were still within my said [desk] at the time of the said fire and that they were destroyed thereby

8. I have not [save for a Contract for Sale dated the —— day of —— 19— and made between myself of the one part and —— of the other part] at any time conveyed mortgaged charged or otherwise encumbered the said property or any part thereof or granted any easements rights or privileges in on or over the same or deposited the said Conveyance with any person or persons for any purpose whatsoever and ever since the date of the said Conveyance I have at all times [subject to the said Contract] been and remain in full free sole and undisputed possession and enjoyment of the said property and entitled to the same for an estate in fee simple in possession subject to the restrictions and stipulations set forth in the First Schedule to the said Conveyance but otherwise free from incumbrances

AND I make this solemn declaration conscientiously believing the same to be true and under and by virtue of the provisions of the Statutory Declarations Act 1835

DECLARED AT *etc.*

FORM 31

Deed of Enlargement by Trustees of the estate of a deceased Mortgagee where the right to redeem has become statute barred and Statutory Declaration in support

I

Deed of Enlargement

THIS DEED OF ENLARGEMENT is made the —— day of —— 19— by AB of *etc.* and CD of *etc.* (hereinafter called "the Trustees")

WHEREAS:

1. BY a Mortgage (hereinafter called "the Principal Deed") dated the —— day of —— 19— and made between MN of the one part and XY (hereinafter called "the Mortgagee") of the other part the freehold property therein particularly described and whereof particulars are set out in the Schedule hereto was demised to the Mortgagee for the term of 3,000 years by way of mortgage for securing the payment to the Mortgagee of the sum of £— with interest thereon and subject as therein expressed

2. THE Mortgagee entered into possession and receipt of the rents and profits of the property comprised in the Principal Deed in or about the month of —— in the year 19— and thereafter remained in uninterrupted possession or receipt of the rents and profits of the said property until his death which in fact took place on the —— day of —— 19—

3. BY his Will dated the —— day of —— 19— the Mortgagee appointed his wife EF and the said CD (party hereto) to be the executors thereof

4. THE said Will of the Mortgagee was duly proved in the [Principal] Probate Registry on the —— day of —— 19— by the said EF and CD as the executors therein named

5. FROM and after the death of the Mortgagee and until the death of the said EF on the —— day of —— 19— the said EF

and CD and as from the date of the death of the said EF and until the date of the Order next hereinafter referred to the said CD entered into and remained in uninterrupted possession and receipt of the rents and profits of the property comprised in the Principal Deed

6. BY an Order of the Chancery Division of the High Court dated the —— day of —— 19— and made by the Honourable Mr. Justice —— in certain proceedings whereof the title to the record is "In the matter of the Trusts of the Will of XY deceased and in the matter of the Trustee Act 1925—19— X No. ——" the Trustees were appointed to be Joint Judicial Trustees of the said Will of the Mortgagee and to complete the administration of his estate and by the said Order it was ordered (inter alia) that the properties whereof particulars were set out in the First Schedule thereto (which First Schedule included the property comprised in the Principal Deed) should vest in the Trustees for all the estate and interest therein then vested in the said CD as the surviving executor of the said Will to be held by them upon the trusts of the said Will

7. EVER since the date of the hereinbefore recited Order the Trustees have been and are now in uninterrupted possession and receipt of the rents and profits of the property comprised in the Principal Deed

8. SINCE the Mortgagee entered into possession and receipt of the rents and profits of the property comprised in the Principal Deed as aforesaid neither the said MN nor any person deriving or purporting to derive title through or under him has either brought any action or suit to redeem the mortgage created by the Principal Deed or made any claim to be entitled to the property aforesaid or the rents and profits thereof or any part of such rents and profits

9. NEITHER the said CD nor the Trustees or either of them has at any time during the twelve years immediately preceding the date of this Deed given to the said MN or any person claiming his estate or to the agent of either the said MN or any such person any acknowledgment of the title of the said MN or of his right of redemption to or in respect of the property comprised in the Principal Deed or received from the said MN or any such person

as aforesaid any sum on account of principal or interest under the Principal Deed

10. THE Trustees as the Judicial Trustees appointed by the said Order dated the —— day of —— 19— are now absolutely entitled to the property comprised in the Principal Deed for all the unexpired residue of the said term of 3,000 years

11. THE Trustees are desirous of enlarging the said term of 3,000 years into a fee simple

NOW THIS DEED WITNESSETH that under and by virtue of the power in this behalf conferred by sections 88 and 153 of the Law of Property Act 1925 and of all other powers (if any) them hereunto enabling the Trustees hereby jointly and severally declare that from and after the execution of this Deed the residue now unexpired of the said term of 3,000 years created by the Principal Deed shall as regards all the property therein comprised being the property whereof particulars are set out in the Schedule hereto) be and the same is hereby enlarged into a fee simple discharged from any legal mortgage affected by the title now vested in the Trustees under the Limitation Act 1939 or any other act relating to the limitation of actions and that henceforth they shall stand possessed of the said property or the fee simple in respect thereof upon the trust for sale imposed by section 31 of the Law of Property Act 1925 or otherwise as the same ought to be held

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO

II

Statutory Declaration

(*to accompany the last form*)

I CD of *etc.* do solemnly and sincerely declare as follows:

1. ON the —— day of —— 19— I together with EF late of —— in the County of —— who died on the —— day of ——

19— proved in the [Principal] Probate Registry the last will of XY (hereinafter called "the Testator") late of —— in the County of —— who died on the —— day of —— 19—

2. FROM and as a result of my investigations in connection with the estate of the Testator I have ascertained and verily believe that in the month of —— 19— the Testator entered into and thereafter and until the date of his death on the —— day of —— 19— the Testator remained in the undisturbed and uninterrupted possession and receipt of the rents and profits of all the hereditaments and premises comprised in a Mortgage dated the —— day of —— 19— and made between one MN of the one part and the Testator of the other part which premises are commonly known as ——

3. FROM the date of the Testator's death and until the —— day of —— 19— I continuously acted as an executor of the Testator's said Will

4. SINCE the —— day of —— 19— aforesaid I have acted jointly with AB of —— in the County of —— as a Judicial Trustee in respect of the administration of the Testator's estate

5. HAVING regard to the facts set forth in paragraphs 1 and 3 hereof I am able positively to depose from my own knowledge as to all dealings with the estate of the Testator and in particular as to the persons in possession and receipt of the net rents and profits of the property comprised in and subject to the said Mortgage dated the —— day of —— 19— from the date of the Testator's death until the date of this Declaration

6. THERE is now produced and shown to me and marked "A" a true copy of a Deed of Enlargement dated the —— day of —— 19— duly executed by the said AB and me the said CD by the terms of which the mortgage term created by the said Mortgage dated the —— day of —— 19— was enlarged into a fee simple I say that all the facts set out in the recitals other than the recitals numbered —— of the said Deed of Enlargement are within my own knowledge and are true and correct and that the facts set out in the recitals numbered —— of the said Deed of Enlargement are to the best of my knowledge information and belief true and correct such knowledge information and belief being gained and

founded upon and as a result of my investigations of the affairs of the Testator shortly after the date of his death

And I make this solemn Declaration conscientiously believing the same to be true and under and by virtue of the provisions of the Statutory Declarations Act 1835

Declared at *etc.*

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